TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 126.

THE AMERICAN BOOK COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS *EX REL.* GALEN NICHOLS, COUNTY ATTORNEY OF SHAWNEE COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED SEPTEMBER 8, 1906.

(18,658.)

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1 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of The County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
} Transcript of Record.

Be it remembered, that on the 7th day of June A. D. 1902, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in *quo warranto* in the above entitled action which petition is in words and figures following, to-wit:

2 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of THE COUNTY ATTORNEY of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
} No. —.

Petition.

Galen Nichols, county attorney of the county of Shawnee in the State of Kansas, who prosecutes for said State, comes now unto the supreme court of the State of Kansas; and in behalf of said State gives the court to understand and be informed that: The defendant, The American Book Company, is a corporation, incorporated under and by virtue of the laws of a State other than the State of Kansas, to wit, the State of New Jersey, and having no other corporate rights, privileges, or powers in the State of Kansas, than those granted by the general laws of said State concerning foreign corporations; that for more than three years last past, said American Book Company has exercised and still does exercise in the State of Kansas and in the county of Shawnee, certain corporate powers not conferred upon it by law; and has omitted certain acts prescribed by the laws of Kansas, which amounts to a forfeiture of all privileges secured by said laws to wit:

The corporate power of making, entering into, and signing contracts in the said State with school-boards, the Kansas school text book commission and other persons resident of Kansas for
3 the sale, supplying and furnishing of text-books and the actual furnishing of school-books, for use by the pupils of the State of Kansas, the said company during the month of May, 1902, entered into a contract with the Kansas State text-book commission in said county and State for the furnishing of certain school-books, for use in the schools of Kansas, for the ensuing five years, by the terms of which said contract, the said defendant has secured the right to furnish certain books for use in the schools of the State of Kansas, from said State text-book commission, and is now doing

business in the State of Kansas and is carrying out its said contract by the placing stocks of books in the different counties for sale under said contract, in all of which said business in the sale of its said books and in the entering into of the contract so described with the said text-book commission, and the doing of said business, the said American Book Company was acting and is now acting in said county in violation of chapter 23 of the General Statutes of the State of Kansas of 1902, and the said defendant has unlawfully and willfully persisted in the violation of the provision of said laws in this to wit:

First. That the said American Book Company has failed and neglected to make an application to the charter board of the State of Kansas for authority to do business in the State of Kansas, as a foreign corporation.

Second. Said American Book Company has willfully neglected for more than three years and for all of the time during which it was illegally doing business in the State of Kansas, to comply with the provision of the statute, requiring said corporation to file in the office of the secretary of state, within thirty days after the taking effect of said act, to wit, January 11, 1899, as a condition precedent to doing business in the State of Kansas, its written consent, irrevocable that actions may be commenced against such corporation in the proper court of any county in this State, in which the cause of action arose.

Third. Said American Book Company has unlawfully and willfully refused to file with the secretary of state a complete detailed statement of the condition of such corporation, as provided
4 by said law, by reason of which said failure to comply with said law, all of defendant's rights, under and by virtue of the provision of said law, have been forfeited, and all of the contracts entered into by said company in the State of Kansas, and all business transacted by it in said State, have been made and entered into and conducted by the exercise of corporate powers not conferred upon it by the laws of said State, but in total disregard of all of the provisions of the law applicable in such cases and against the policy of the State, and the said unlawful acts aforesaid and the unlawful continuance of the defendant to do business in the said State of Kansas, have caused and are causing great injury to the plaintiff and to the public.

Said county attorney further informs the court that he has no other plain and adequate remedy except as herein prayed. Wherefore the said county attorney on behalf of said State prays that the said defendant be required to show by what warrant or authority it exercises corporate rights and enters into and transacts business as a corporation in the State of Kansas; and that it may be ousted for ever from the exercise of such usurped corporate power, and that the contract entered into with the Kansas text-book commission may be declared null and void, and for such other relief as may be proper and for the cost of this proceeding.

GALEN NICHOLS,
County Attorney Shawnee County, Attorney for Plaintiff.

Endorsed: No. 13194.—The State of Kansas *ex rel.* County Attorney, plaintiff, *vs.* The American Book Company, a corporation, defendant.—Petition.—In *quo warranto.*—Filed June 7, 1902. D. A. Valentine, clerk supreme court.—Galen Nichols, Co. att'y, attorney for plaintiff.

5 And afterwards, and on the same day, to-wit, the 7th day of June 1902, the plaintiff in said action filed the affidavit of Galen Nichols, county attorney, which was in words and figures following:

6 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.*, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } No. —.

STATE OF KANSAS,
Shawnee County, } *ss:*

Galen Nichols being sworn says: That he is the county attorney of Shawnee County, Kansas, and as such makes the application to this court for an order of *quo warranto* in the above case, and states as a reason for bringing the action in this court instead of the district court of Shawnee county; that the State is a party to the proceeding, and the question involved is one affecting the whole public; the defendant, The American Book Company, having entered upon the execution of a contract, affecting every school district in the State and the validity of which is questioned in said proceedings, and a delay in the settlement of said controversy would work a great injury to the public; and a speedy hearing and determination should be had, that the State may be advised what its rights are under the information set out in its cause of action, which speedy determination could not be had in the usual course of proceeding through the inferior court.

He therefore asks this court to entertain his application and grant the order asked for and he will ever pray.

[SEAL.] GALEN NICHOLS,
County Attorney.

Subscribed and sworn to before me this 7th day of June, 1902.
Com. expires Feb.–5–1905.

W. I. JAMISON,
Notary Public.

7 (Endorsed:) No. 13,194.—The State of Kansas, *ex rel.* County Attorney, plaintiff, *vs.* The American Book Company, a corporation, defendant. Affidavit. Filed June 7, 1902. D. A. Valentine, clerk supreme court. Galen Nichols, county att'y, attorney for plaintiff.

And afterwards, and on the same day, to-wit, the 7th day of June, 1902, the plaintiff filed its precipe for summons in said action in words and figures following:

8 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* COUNTY Attorney Shawnee County, Kansas, Plaintiff, *vs.* THE AMERICAN BOOK COMPANY, a Corporation, Defendant.	Precipe for Summons.

The clerk of the court will please issue summons to the American Book Company, a corporation, of New Jersey, in the above entitled case—returnable according to law, directed to the secretary of state of the State of Kansas.

GALEN NICHOLS,
County Attorney Shawnee County, Kansas.

(Endorsed:) No. 13194—The State of Kansas *vs.* The American Book Company—Precipe for summons—Filed June 7, 1902, D. A. Valentine, clerk supreme court.—Galen Nichols, county attorney.

9 And afterwards, and on the same day, to-wit, the 7th day of June, 1902, a summons was issued in said action out of said supreme court which said summons was returned and filed on the 9th day of June, 1902, the summons and return thereto with all endorsements being in words and figures following:—

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of THE COUNTY Attorney of Shawnee County, Plaintiff, *vs.* THE AMERICAN BOOK COMPANY, a Corporation, Defendant.	Summons.

The State of Kansas to the secretary of state of the State of Kansas, Greeting:

You are hereby commanded to notify the American Book Company, of New Jersey, that it has been sued in the supreme court of the State of Kansas, and that it must answer the petition filed against it by the plaintiff, The State of Kansas, on the relation of Galen Nichols, county attorney of Shawnee county, Kansas, on or before the 18th day of July, 1902, or the said petition will be taken as true and judgment rendered accordingly.

You will make the return of this writ on or before the 17th day of June, 1902, according to law.

In witness whereof, I have hereunto signed my name and affixed

the seal of said supreme court of Kansas at my office in the city of Topeka, this 7th day of June, 1902.

D. A. VALENTINE,
[SEAL.] *Clerk Supreme Court of the State of Kansas.*

STATE OF KANSAS, }
Office of the Secretary of State. }

June 7th, 1902, I received this writ, and I hereby certify that on June 9, 1902, I served the same on the within named defend-
10 ant, The American Book Company, by transmitting to *Gilman H. Tucker, secretary of said* defendant at New York city, N. Y., by registered mail, a duly certified true copy of the within summons, with all of the endorsements thereon.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 9th day of June, 1902.

[SEAL.] GEO. A. CLARK,
Secretary of State.

Endorsements: No. 13194. The State *ex rel.* Co. Att'y Shawnee County, *vs.* The American Book Company.—Summons.—Issued June 7, 1902; returnable June 17, 1902; answer day, July 18, 1902.—Filed Jun- 9, 1902, D. A. Valentine, clerk supreme court.—

11 And afterwards, to wit, on the 11th day of July 1902 the plaintiff filed the affidavit of Galen Nichols, county attorney for an injunction in said action which affidavit is in words and figures as follows:

12 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of THE COUNTY Attorney of Shawnee County, Plaintiff, } No. —.
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.

STATE OF KANSAS, }
Shawnee County, } *ss:*

Affidavit for Injunction.

Galen Nichols, being sworn according to law, says: That he is the county attorney of Shawnee county, Kansas, and that he is acquainted with the facts herein stated; and that he has filed a petition in the supreme court of the State of Kansas against the defendant, a corporation organized in a State other than the State of Kansas, charging it with attempting to do business in the State of Kansas, contrary to the provisions of the laws of said State, and asking that the said defendant company be required to show by what authority it seeks to do business in said State.

And he alleges that the said defendant company has failed to comply with the provisions of the law of this State either by making an application to the charter board of the State of Kansas as a foreign corporation or by filing its annual statement as provided by law for those foreign corporations doing business in the State at the time of the taking effect of said act, and for having failed to comply with any of the provisions of said act, relating to foreign corporations; that the said defendant company is now attempting to place stocks of school books with its agents in the State of Kansas
13 for the purpose of complying with a contract made by said defendant company with the Kansas school text-book commission, which said contract entered into by said defendant company, this affiant believes to be null and void; that the furnishing of said school-books and the attempt by said defendant company to comply with its said contract, during this litigation, would produce injury to the plaintiff and the public and would render nugatory any judgment of this court that might be rendered in case the prayer of the petition should be granted, and such business transacted by said defendant company at this time would be in violation of the plaintiff's rights and would render its judgment ineffectual.

He therefore asks that an injunction be granted, restraining said defendant from entering into any contract with any person in the State of Kansas, and from the furnishing of school-books to its agents in said State, and from the transaction of any business of any kind in the State of Kansas; and that on a final hearing of said application that the said injunction may be made perpetual and the said defendant for ever enjoined from doing business in the State of Kansas.

GALEN NICHOLS.

Galen Nichols county attorney being sworn says he has read the foregoing affidavit and that the matter and things therein contained are true as he verily believes.

Subscribed and sworn to before me this 10 day of July, 1902.

[SEAL.] M. F. LAYCOCK.

(Endorsed:) No. 13194. The State of Kansas *ex rel.* County Att'y Shawnee County, plaintiff, *vs.* The American Book Company, a corporation, defendant. Affidavit. Filed July 11th 1902 D. A. Valentine clerk supreme court. Galen Nichols, attorney for plaintiff.

14 And afterwards, to wit, on Friday the 11th day of July 1902 before the Hon. E. W. Cunningham, justice of the supreme court of the State of Kansas at his chambers in the city of Topeka the following proceeding was had and remains of record at page 165 of Journal "FF" of said supreme court of the State of Kansas and is in words and figures following:

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
No. 13194.

And now, on the 11th day of July, 1902, at chambers, comes the said Galen Nichols, attorney for plaintiff, and thereupon the application for an injunction of the said plaintiff came on to be heard, and after hearing the evidence adduced and the argument of counsel, it is considered and ordered that an injunction issue in this case, as prayed for in said petition to restrain the said American Book Company, defendant, from entering into any contract with any person in the State of Kansas and from the furnishing of school-books to its agents in said State and from the transaction of any business of any kind in the State of Kansas, until the further order of the court or some justice thereof. And it is further ordered that said order of injunction be issued by the clerk of said court and that the same be served on the defendant herein.

15 And thereupon, and on said 11th day of July, A. D. 1902, there issued out of said supreme court of Kansas an order of injunction, which, together with the return of the secretary of state and other endorsements thereon, is in words and figures following:

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of GALEN NICHOLS, County Attorney, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
No. —.

Order of Injunction.

To the American Book Company, a corporation, defendant, Greeting:

You are hereby notified and warned that The State of Kansas, plaintiff, has this day duly obtained an order of injunction in an action pending in the supreme court of the State of Kansas, wherein The State of Kansas is plaintiff and you are defendant.

This is, therefore, to command you to refrain from entering into any contract with any person in the State of Kansas, or from the furnishing of school books to your agents in said State, and from the transaction of any business of any kind in the State of Kansas.

And this you will in no wise omit to do under the penalty of the law.

Witness my hand and the seal of said court at Topeka this 11th day of July, 1902.

[SEAL.]

D. A. VALENTINE,
Clerk Sup. Ct.,
By H. L. ARMSTRONG, *Dep.*

16 THE STATE OF KANSAS, }
Executive Department. }

OFFICE OF THE SECRETARY OF STATE.

Received this order July 12th, 1902, and on July 14th, 1902, I served the same on the within named defendant, "The American Book Company," by transmitting by registered mail to Gilman H. Tucker, secretary of said defendant, at New York city, N. Y., a true copy of the within order of injunction, with all of the endorsements thereon duly certified.

Witness my hand and official seal, this 14th day of July, A. D. 1902.

[SEAL.] GEO. A. CLARK,
Secretary of State.

(Endorsed:) No. 13194. The State of Kansas, *vs.* The American Book Company. Order. Issued July 11, 1902. Filed July 14, 1902. D. A. Valentine, clerk supreme court.

17 And afterward, on the 15th day of July, A. D. 1902, the defendant, The American Book Company, filed its motion to vacate and set aside the order of injunction theretofore made, which motion is in words and figures following:

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant.

Now comes the defendant, The American Book Company, and moves the court here to vacate and set aside the order heretofore, to-wit, on the 11th day of July, 1902, made by the Honorable E. W. Cunningham, one of the justices of this court, awarding to the plaintiff an injunction, for the following reasons, to-wit:

I.

That neither the court nor any of its justices has jurisdiction or power to make said order in said cause.

II.

That the effect of the said injunction if continued is a substantial and final judgment in said action in that it deprives this defendant of the right to continue in the transaction of business in Kansas in advance of a trial and judgment upon the merits; that such being the effect of the said order, it is not due process of law and the said defendant has thereby been deprived of such due process of law and has been denied the equal protection of the laws and the said order is in consequence violative of the 14th amendment to the

Constitution of the United States, and this defendant expressly invokes the protection of the said amendment.

III.

That this defendant is engaged in Kansas solely in the business of interstate commerce; that the plant and factory of said defendant where its books are prepared and manufactured are in another State and the books supplied by the defendant to its con-
18 sumers and to the public in Kansas are manufactured and shipped by said defendant from points in other States to points in the State of Kansas and there sold and delivered; that the only business which the defendant is transacting in the State of Kansas is the shipment to the State and the sale within the State of its books manufactured outside of the State. That by reason of the premises this defendant is not within the provisions of chapter 10 of the Session Laws of 1898, and the amended statutes of the State of Kansas, and is protected in its right to transact business in the State of Kansas by section 8, article I of the Constitution of the United States, and this defendant expressly invokes the protection of said section of the Constitution.

IV.

That the said order was improvidently issued without notice to the defendant or any of its counsel, and without any opportunity by them to be heard and was issued upon an *ex parte* application of the attorneys for the plaintiff and as this defendant is informed and believes, and therefore charges the fact to be, upon an affidavit filed in said cause by the county attorney merely upon information and belief and without the said county attorney being advised of the facts or in the position to testify with reference to the same.

V.

That the petition in this action fails to state a cause of action in that it nowhere appears that a forfeiture of the right to transact business has been declared by the State charter board, which is a necessary condition precedent to said suit.

VI.

Construing said petition as an equitable proceeding, in which an interlocutory injunction might issue, and conceding the jurisdiction of this court in a proceeding of such character, which this defendant denies, the said petition is further fatally defective by reason of the defect of parties defendant.

VII.

The affidavit of the county attorney upon which the writ
19 was issued is insufficient in form; being upon information and belief, it states nothing but conclusions and not the facts

upon which they are based, and the conclusions therein stated are false and unwarranted deductions from the facts touching and concerning said matter.

VIII.

That this defendant has in fact complied with chapter 10 of the Laws of 1898, not by reason of any admission that the said law is operative upon it, but out of a decent regard to the construction placed upon said law by the authorities of the State.

IX.

That there is now pending in the district court of Shawnee county Kansas, a certain suit instituted by the State of Kansas on the relation of the county attorney of Shawnee county, against this defendant, being case No. 21,691; wherein the said plaintiff is seeking to obtain the same relief as that sought to be obtained here, and in which the issues are identical with those in the case at bar. That in said action so pending in the district c-urt of Shawnee county the plaintiff obtained a restraining order, and thereafter on the 3rd day of June, 1902, the hearing of its application for a temporary injunction occurred. Whereupon, upon full argument and being well advised in the premises, the court overruled and denied said application for a temporary injunction and set aside the said restraining order. That thereupon the said plaintiff took leave to amend its petition. That the said order of June 3, denying the application for temporary injunction still remains of record in said court in full force and effect, wholly unreversed and unappealed from, and by reason of the premises there has been for the purpose of this case and at this stage of the litigation an adjudication between the parties upon said question.

X.

That the continuance of this writ of injunction would result in irreparable injury of this defendant without any means of redress if it shall ultimately defeat plaintiff's contention in the case.

XI.

That the public at large as well will suffer great damage and inconvenience by the continuance of this injunction.

20 XII.

That this proceeding, as well as the one pending in the district court of Shawnee county, have been instituted not for any public purpose, but to serve the private ends of a corporation organized under the laws of the State of New Jersey, to-wit, George W. Crane & Company, an unsuccessful competitor of the defendant in the bidding before the State text book commission.

Wherefore, by reason of the foregoing and by reason of other

sufficient and manifest errors appearing upon said record, this defendant prays as aforesaid.

F. DUMONT SMITH,
A. M. HARVEY,
ROSSINGTON, SMITH & HISTED,
H. G. LARIMER,
Attorneys for Defendant.

(Endorsed:) No. 13194. Supreme court. State *ex rel. vs.* American Book Co.—Motion to set aside injunction. Filed Jul- 15, 1902, D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, attorneys for def't.

21 And afterwards, and on the 16th day of July, 1902, the defendant filed in said action the affidavit of A. M. Harvey, which is in words and figures, to-wit:—

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } No. 13194.

Affidavit.

STATE OF KANSAS, *Shawnee County,* } *ss:*

I, A. M. Harvey, of lawful age, being duly sworn on oath says: That at the time of the enactment of chapter ten of the Laws of Kansas, of the Special Session of 1898, the American Book Company, was engaged in selling school text books and reference books to the people of the State of Kansas and has continued in that business from that date to the present time; which school text books and reference books were and are manufactured in a State other than the State of Kansas, and shipped from points outside of the State of Kansas to points within the State of Kansas, there to be sold and delivered.

That the American Book Company, on the 5th day of May, 1902, filed with the secretary of state its irrevocable written consent that actions might be commenced against it in the proper court of any county in the State, in which the cause of action might arise, or in which the plaintiff might reside, by the service of process on the secretary of state, as provided in chapter ten of the Laws of Kansas, Special Session of 1898.

That on the 10th day of May, 1902, the attorney general of the State of Kansas, demanded of the American Book Company, through one of its attorneys, that a showing be made to the charter board of

22 the State of Kansas as to whether said American Book Company was doing business within the State of Kansas at the time of the going into effect of said chapter ten of the Laws of Kansas, Special Session, 1898; and pursuant to said demand said American Book Company filed with the secretary of state an affidavit, in writing, setting forth in detail the character and nature of its business as transacted in Kansas during the year 1898 and from that time until the present time; and afterwards the said charter board, at a meeting held in the office of the secretary of state, considered the showing so made by the American Book Company and informed said company that said showing was sufficient to entitle it to file its consent to be sued as a corporation that had been doing business in the State of Kansas at the time of the enactment of the said chapter ten of the Laws of Kansas, Special Session, 1898.

That on the 31st day of May, 1902, said American Book Company filed its annual report with the secretary of state in accordance with law.

That when said chapter ten of the Laws of Kansas, Special Session, of 1898, was enacted and from that time until the month of May, 1902, the construction put upon said statute by the attorney general, the State superintendent of public instruction and the State text-book commission did not require foreign corporations to comply with the corporation laws as a condition precedent to contracting with the text-book commission or selling books under such a contract and on this account the American Book Company, as well as Scott, Foresman & Company; D. C. Heath & Company; Rand, McNally & Company, and other foreign corporations that were doing business in Kansas under contract with the text-book commission, did not make any effort to comply with the corporation laws of the State until the attorney general, in May, 1902, made a ruling that all such companies should comply with said corporation laws and then each of the above named companies, under the order of the attorney general and the supervision of the charter board, did comply with said corporation laws in the same manner and after the same form as did the American Book Company.

That the business now being done and contemplated in the State of Kansas by the American Book Company consists wholly in selling to the people of the State of Kansas books manufactured
23 in a State other than the State of Kansas, and shipped from points outside of the State of Kansas to points within the State of Kansas, there to be sold and delivered.

Further affiant saith not.

A. M. HARVEY.

Subscribed and sworn to before me this 16 day of July, 1902.

H. L. ARMSTRONG,
Deputy Clerk Sup. Ct.

[SEAL.]

Endorsed: No. 13191.—Supreme court.—State of Kansas *vs.* American Book Co.—Affidavit of A. M. Harvey.—Filed July 16, 1902. D. A. Valentine, clerk sup. court.—Rossington, Smith & Histed, attorneys for defendant.

24 And afterward, and on the 16th day of July, 1902, the defendant filed the affidavit of A. M. Harvey in said supreme court, which is in words and figures following:

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant.
} No. 13194.

Affidavit.

STATE OF KANSAS, *Shawnee County,* } ss:

I, A. M. Harvey, of lawful age, being duly sworn on oath say that on the 31st day of May, 1902, an action was commenced in the district court of Shawnee county, Kansas, wherein The State of Kansas was plaintiff and The American Book Company was defendant and that the subject matter of said action was the same as the case at bar. A true copy of the petition filed in said action is hereto attached, marked "A" and made a part of this affidavit. That in said action a restraining order was issued and the application for a temporary injunction was set down for hearing in said court for the 3rd day of June, 1902. That on the 3rd day of June, 1902, said cause came on to be heard in said court on the application for a temporary injunction and after argument of counsel and consideration by the court, the court made an order denying the application for a temporary injunction and dissolved the restraining order theretofore issued, and said order, so made, now stands of record in said court in full force and effect and unappealed from. The plaintiff then asked for leave to amend its petition which leave was by the court granted. That said cause is still pending and undetermined in said court.

25 Further affiant saith not.

A. M. HARVEY.

Subscribed and sworn to before me this 16th day of July, 1902.

H. L. ARMSTRONG,
Deputy Clerk Sup. Ct.

[SEAL.]

"A."

In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } 21691.

Petition.

Comes now the plaintiff herein, Galen Nichols, the county attorney of the county of Shawnee, in the State of Kansas, and for his cause of action herein says:

First. That the American Book Company is a corporation, incorporated under and by virtue of the laws of a State other than the State of Kansas. That said American Book Company is a corporation engaged in the business of publishing and selling school books, and has been illegally engaged in the business of selling its books in the State of Kansas for the past three years, during which time it has presented to the school boards of the State, its books for use in the schools of Kansas, and has sold to the boards of education and to the pupils of the State of Kansas, certain of its books and publications, and has entered into contract for the furnishing of school books for use in the State, all of which books were published outside of the State of Kansas and by the said American Book Company. And the said American Book Company appeared before the Kansas State text-book commission on the 5th day of May, 1902, in the city of Topeka, with a bid, offering to furnish certain school books for use in the schools of Kansas for the ensuing five years, and were seeking to do business in the State of Kansas as a foreign corporation, through said text-book commission,
26 and did secure from said text-book commission an adoption of certain of its books for use in the schools of Kansas; and is now seeking to have said text-book commission sign a contract with said American Book Company, giving to said company the right to furnish the books so adopted. That all of its said acts in the soliciting of business in the State of Kansas, for the sale of school books in the State of Kansas, and in its bid before the said text book commission, a commission provided for by the laws of the State of Kansas, the said American Book Company was acting in said county, in violation of chapter 23 of the Compiled Laws of the State of Kansas of 1901; and has unlawfully and willfully persisted in such violation of the plain provision of said laws, in this, to-wit:

First. That the said American Book Company has failed and neglected to make an application to the charter board of the State of Kansas for authority to do business in the State of Kansas as a foreign corporation.

Second. Said American Book Company has willfully neglected,

for more than three years, and for all of the time during which it was illegally doing business in the State of Kansas, to comply with the provisions of the statute requiring said corporation to file in the office of the secretary of state, within thirty days after the taking effect of said act, to-wit, January 11, 1899, as a condition precedent to doing business in the State of Kansas, its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this State in which the cause of action arose.

Third. That said American Book Company has unlawfully and willfully refused to file with the secretary of state a complete detailed statement of the condition of such corporation, as provided by said law, by reason of which said failure to file said statement by the said American Book Company, whatever right or authority it had to do business in this State by reason of its claim that it was doing business in this State at the time said corporation law took effect, all of the defendant's rights, under and by virtue of the provisions of said law have been forfeited and the said unlawful acts aforesaid, and the unlawful continuance of the defendant to
27 do business in the State of Kansas, have caused and are causing great injury to the plaintiff and to the public.

Wherefore, the plaintiff prays judgment against the said defendant that all the rights and privileges of whatever kind the said defendant claims, be declared forfeited, and that the defendant be forever enjoined from doing business in the State of Kansas, and that the defendant be adjudged to pay the costs of this proceeding.

GALEN NICHOLS,
County Attorney, Shawnee County, Kansas.

Præcipe.

The clerk will please issue summons in the above entitled cause, directed to George A. Clark, secretary of state, commanding him to summon the defendant American Book Company to appear and answer in said case.

GALEN NICHOLS,
County Attorney, Shawnee County, Kansas.

Restraining order granted.
Filed May 31, 1902.

A. M. CALLAHAM,
Clerk District Court.

(Endorsed:) No. 13194—Supreme court—State of Kansas *vs.* American Book Com.—Affidavit of A. M. Harvey—Filed Jul- 16, 1902. D. A. Valentine, clerk supreme court.—Rossington, Smith & Histed, attorneys for defendant.

28 And afterward, to-wit, on the 18th day of July, A. D. 1902, the defendant in said action filed its answer to the petition

of the plaintiff, which said answer is in the words and figures following, to-wit:—

29 Filed Jul- 18, 1902. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant.
} No. 13194.

Answer.

Now comes the said defendant and for its answer to the petition of plaintiff herein, says:

I.

That it denies each and every allegation in said petition contained, not hereinafter expressly admitted or qualified.

II.

Defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey. Defendant further says that on or about the 31st day of May, 1902, this defendant duly executed certain contracts in writing with the Kansas State text book commission; which said contracts were duly executed by the chairman and the secretary of the Kansas State text book commission, duly authorized therefor. Copies of which said contracts are hereto attached, marked Exhibits "A, B and C," and made a part of this answer.

At the same time this *this* defendant executed its bond, or obligation, for the faithful performance on the part of this defendant of the said contracts, which said bond was thereafter and in due time duly approved by the executive council of the State of Kansas. A copy of which said bond is hereto attached, marked Exhibit "D," and made a part of this answer.

30 III.

And this defendant further answering says that at the time of bringing this suit, and now, the business of this defendant within the State of Kansas was and is solely that of inter-state commerce. That the only business of any character transacted by this defendant within the State of Kansas has been, and is, that of selling school text books, reference books, and other publications, to dealers and merchants in the State of Kansas. That this defendant is the owner of certain copyrights and prepares and manufactures its own books and publications. That for such purposes this defendant owns and operates in Cincinnati, Ohio; Chicago, Illinois, and New York city, certain factories and binderies, wherein the type for its publications

is set and the same are completely printed, bound and prepared for sale and transportation to customers. That this defendant does not now, and did not at the time of the bringing of this suit, own any property connected with the manufacture and sale of said business within the State of Kansas, nor any other property whatsoever within the said State. That this defendant has been, and is now, engaged in selling its said publications to dealers and merchants located at various points in the State of Kansas and other States of the United States, and in making such sales packs and ships its said publications over appropriate rail roads, consigned to the persons to whom they are sold, and delivers them to the consignees in the original packages in which they were packed for shipment. That with reference to the State of Kansas all sales of such merchandise made by this defendant are of goods manufactured and shipped from points in other States to points within the State of Kansas and there delivered in the original packages to such purchasers. That this defendant, prior to the passage of the act of 1898, made and executed certain contracts with school districts fixing the price at which this defendant would sell certain publications to the public, which said contracts continued in force at the time of the passage of the said act, and some of which are still in force. That the only purpose and scope of said contracts was the fixing of the price at which publications might be sold and delivered by this defendant to such dealers or persons as might thereafter choose to buy. And such contracts are merely incidental features of the inter-state business of this defendant hereinbefore set out. That such has been the sole character of the business in which this defendant has been engaged in the State of Kansas for many years last past, and said defendant was engaged in such business at the time of the passage of chapter 10, of the Session Laws of 1898.

31 And this defendant further answering says that by reason of the premises chapter 10, of the Special Session Laws of Kansas for the Year 1898, and chapter 125 of the Session Laws of 1901, do not apply to this defendant, and this defendant is not amenable thereto. That if said statutes be construed as applicable to this defendant then the same are in violation of the provisions of section 18, of article 1, of the Constitution of the United States, in that they seek to regulate and impose burdens and restraints upon interstate commerce, and this defendant hereby expressly invokes the protection of the said section of the Constitution of the United States.

III½.

And this defendant further answering, refers to, adopts, and makes a part hereof the third paragraph of its answer. And further answering this defendant says that if the said act of 1898, as amended, be construed as applicable to this defendant, and to authorize the court in this proceeding to grant the judgment of ouster, therein prayed, then the said act is in violation of section 10, article 1, of the Constitution of the United States, in so far as it attempts to interfere with the due performance by this defendant of its contracts made

and entered into prior to the passage of said act which are in force, it being a law impairing the obligation of contracts, and this defendant expressly invokes the protection of the Constitution of the United States in that behalf.

IV.

And this defendant further answering such parts of the petition as seek to determine the validity of the contracts hereinbefore set forth, and to annul and vacate the same, respectfully denies the jurisdiction of this court in that behalf. That the matter so sought to be involved is one of equitable cognizance and this court, in this proceeding, does not possess equitable jurisdiction and has no power, right, or authority to enter into the trial of the validity of said contracts, or render the judgment sought by the plaintiff in that behalf, or any other judgment in respect thereto.

32

V.

And further answering this defendant says that assuming the equitable jurisdiction of this court to enter into an inquiry and determination of the question set forth in paragraph IV hereof, (which this defendant denies), there is a defect of parties defendant, to wit: The State of Kansas and the State text book commission. And no judgment can be entered affecting the rights or obligations of this defendant respecting said contracts or bond in the present condition of this record or in a proceeding of this character.

VI.

And this defendant hereby refers to, adopts, and makes a part hereof, without further repetition, paragraphs IV and V of this answer. And further answering said defendant says that the effect of a trial and determination, adverse to the rights of this defendant, under its contracts and bond, hereinbefore set forth, in this suit would not be due process of law, and this defendant would thereby be deprived of its property without due process of law, within the meaning of the fourteenth amendment to the Constitution of the United States. That this proceeding, in so far as it attempts to adjudicate the rights of this defendant, under its contracts, is in violation of the said provision of the fourteenth amendment to the Constitution of the United States, in that it subjects this defendant to a trial in a court which does not possess jurisdiction of the subject-matter, and in that it is an attempt to adjudicate the rights and obligations of this defendant upon its contracts and bond without the presence of the other party thereto, and without affording by such pending adjudication any protection to this defendant against the liabilities incurred by said contracts and bond. And this defendant expressly invokes the protection of the said amendment.

33

VII.

And further answering this defendant refers to, adopts and makes a part hereof, paragraphs IV, V and VI of its answer, the same as

if repeated herein, and says that a trial and determination, adverse to this defendant, of the rights and obligations under the contracts and bond, hereinbefore set forth, in this action would be a denial to this defendant of the equal protection of the laws as guaranteed to this defendant by the fourteenth amendment to the Constitution of the United States, in that, both by the constitution and statutes of the State of Kansas and the decisions of the State supreme court, the supreme court does not possess original equitable jurisdiction; in that it is an attempt, in a *quo warranto* proceeding, to try and determine matters of equitable cognizance and adjudicate the rights and liabilities of this defendant upon its contracts and bond, whereas by the constitution and laws of the State of Kansas and the decisions of the supreme court of the State, this court, in this action, does not possess such jurisdiction; and such jurisdiction has been uniformly denied in proceedings in *quo warranto* in which other citizens of the State of Kansas, or other corporations, have been parties defendant. And this defendant expressly invokes the protection in that behalf of the said fourteenth amendment to the Constitution of the United States.

VIII.

On or about the 31st day of May, 1902, the plaintiff herein commenced an action in the district court of Shawnee county, Kansas, against this defendant, the purpose and object of which said suit being to oust this defendant from the State of Kansas and to prohibit and enjoin this defendant from doing business in the State of Kansas. That said action is identical in every respect with the action at bar. That the said court has jurisdiction of this defendant and said action is still pending therein. That this court ought not, therefore, to hear or determine this action, and this action should be dismissed.

34 IX.

This defendant makes the next preceding paragraphs of this answer a part of this paragraph, as fully as if herein set out. And further answering defendant says that on the 31st day of May, 1902, in the said action in the district court of Shawnee county, Kansas, plaintiff obtained, by consideration of the judge of said court, a temporary order restraining and enjoining this defendant from doing business in the State of Kansas, which said temporary restraining order was effectual to the 3rd day of June, 1902. On said last date, in said action, the plaintiff presented to the district court of Shawnee county, its application for a temporary injunction. That thereupon and on the said day said cause came on to be heard and the court, after due consideration, overruled the application for the said temporary injunction and set aside the said restraining order theretofore granted. That the judgment of the said district court, therein, remains in full force and effect, unreversed and unappealed from, and the same is a full and complete adjudication of the rights of the plaintiff and the defendant.

X.

The defendant further answering says that it has duly complied with all the requirements of the laws of the State of Kansas affecting foreign corporations; has duly filed with the secretary of state its irrevocable consent to be sued in the courts of the State and duly filed with the secretary of state, on or about the 30th day of May, 1902, the annual report of its business and has received from said secretary of state a certificate of said facts, and is thereby authorized to do business within the State of Kansas.

XI.

Defendant further answering says that at the date of the enactment of chapter 10, of the Laws of 1898, and ever since that time, this defendant has been engaged in the business of selling school books and other publications in the State of Kansas, and also had certain contracts with various school districts and school boards in the State of Kansas for supplying school and other books to
35 said school districts and boards and to the schools of Kansas. That on or about the — day of May, 1902, this defendant filed with the secretary of state its consent, irrevocable, to be sued in said State. That on or about the 30th day of May, 1902, an inquiry was duly instituted by the charter board of the State of Kansas respecting the status of this defendant as a corporation engaged in business prior to the enactment of the act of 1898, and its exemption in that behalf from the liability for the fees and charges prescribed by said law and its amendatory statute of 1901. That the evidence was duly presented and heard by said charter board upon the said subject, and upon due consideration the said charter board found and determined that this defendant was not subject to the fees and charges referred to by reason of the fact that it was engaged in business in the State of Kansas at the time of the passage of said law. That thereupon, upon the said 30th day of May, 1902, this defendant, relying upon the determination of the said charter board, and also upon the opinion and instruction of the attorney general of the State of Kansas to the same effect, and believing that it might lawfully so do, and that it would thereby meet and comply with all the terms and requirements of the statutes of Kansas in that behalf, filed with the secretary of state its annual report as required by law, and thereupon the secretary of state issued to this defendant his certificate, in such cases made and provided. And this defendant avers that the said determination of said charter board was a judicial act and a final adjudication of the rights of this defendant in the premises and that said charter board has never declared or published a forfeiture of the right of this defendant to do business in the State, but on the contrary the secretary of state, the said charter board and the attorney general fully acquiesce in and recognize the complete right and authority of this defendant to do business in the State of Kansas.

This defendant respectfully submits that this court has no power

or authority in this action to review or reverse the determination and decision of the charter board, or to change or modify the
36 action of the said charter board, or to oust this defendant from the State in the face of the action of said board and of the departments of state, charged with the administration of said law, as hereinbefore set forth.

XII.

This defendant further answering says that the charter board of the State of Kansas has never at any time declared a forfeiture of the right of this defendant to do business in the State of Kansas, and has at no time published any declaration of such forfeiture in the official State paper. That such declaration and publication are conditions precedent to the jurisdiction of the court in this action, and by reason of the premises this defendant denies the jurisdiction of the court in this case, and asks that the same may be dismissed.

XIII.

Defendant further answering says that ever since the enactment of chapter 10, of the Laws of 1898, it has been the unvarying custom of the charter board of the State of Kansas to permit corporations doing business at the date of the passage of said act, to comply at any time with the terms of said act, relating to foreign corporations, by filing the consent to be sued and the annual report, therein required. That the attorney general of the State of Kansas has so interpreted said act and has uniformly ruled that foreign corporations, doing business in the State at the passage of said act, might comply with the terms of said act at any time by filing their consent to be sued and their annual report. That on or about the 5th day of May, 1902, the State text book commission duly convened according to law for the purpose of receiving bids for the supplying of text books to the schools of Kansas for the term of five years commencing with the first day of September, 1902. The said text book commission invited this defendant, to submit bids for the supplying of said books. And this defendant, in common with other bidders, standing in a like situation, was informed by the attorney general of the State of Kansas and by the said text book commission that its bids would be received and considered without its
37 having complied, as a condition precedent, with the terms of chapter 10, Laws of 1898, and acts amendatory thereto. That thereupon this defendant submitted to the said State text book commission its bids for supplying text books, and its bid for certain books, to-wit: physiologies, geographies and readers, was by the said State text book commission duly accepted. The State text book commission and the attorney general of the State of Kansas thereupon informed this defendant, and all other successful bidders in like situation, that it would be necessary to comply with the said chapter 10, Laws of 1898, by filing their irrevocable consent to be sued and their annual reports, and that the filing of such consents and reports was all that was necessary to authorize the execution of

said contracts and to carry out the same, and that no other or further requirement would be made.

And further answering this defendant says that prior to the time of said bidding it had been the uniform rule of the various officials and departments of the State of Kansas, and such was the interpretation placed upon said law by the attorney general, the charter board, and the text book commission of the State of Kansas, that corporations, like this defendant, were in no respect amenable to the law of 1898, and theretofore contracts for the supplying of text books and school supplies under the State text book law had been duly executed, approved and performed by corporations in the same condition as this defendant, without in any respect complying with the provisions of said corporation act. That it was not until the bidding for such supplies in May, 1902, that any question was even raised as to the application of the corporation act to such corporation transacting such business in the State of Kansas. That thereupon, upon consideration of such question the State authorities, hereinbefore mentioned and described, held and determined that the corporation act of 1898, as amended, did apply to such corporations, but held further that the only provisions of said act which were applicable to this defendant were those which required the filing of a report and a written consent irrevocable, to be sued. The said attorney general interpreted said law and declared that the period
38 prescribed in said act within which reports might be filed was directory and not mandatory, and that under the facts and circumstances of the case it would be a full and satisfactory compliance to make and file said report and consent at the time they were, so as aforesaid, filed. That this defendant, relying upon the interpretation placed upon said act by the plaintiff herein, as represented by the attorney general, the charter board the secretary of state and the State text book commission, and believing that it had in all respects complied with the terms of the statute incumbent upon it to perform, executed the contracts and assumed the obligation hereinbefore set forth. That thereupon, in the honest performance of its contracts, this defendant proceeded with the work of preparing the books specified in its contracts for sale, and is now engaged in such work. That it has already incurred a large amount of expense in that behalf, to-wit, a sum exceeding $20,000.00. And has further assumed obligations and incurred liabilities aggregating many thousands of dollars in addition. That the proclamation of the governor, provided by the text book law, is likely to be issued at any time, all the conditions precedent thereto having been performed. That under the terms of the statute and the bond and contracts of this defendant it is obligated to furnish and ship to customers desiring the books mentioned in its contracts within thirty days from the date of such proclamation. That in no event will the time for the performance of its contracts by this defendant be later than the first of September, 1902. That this defendant, by its contracts is required to furnish forty-five per cent. of all of the school books to be sold to school children, within the State of Kansas, ag-

gregating 400,000. The performance of its obligations will impose upon this defendant the duty of manufacturing, boxing, shipping, and delivering approximately one million volumes within the time limited. And this defendant, in view of the premises, asserts that the State of Kansas is now estopped in equity, law and good conscience from placing a different interpretation upon said corporation act, or from in any way interfering with the performance of its contracts by this defendant, or from ousting this defendant from the State of Kansas.

39 XIV.

The defendant further answering, makes the preceding paragraphs, X, XI, XII and XIII, a part of this paragraph as fully as though set out in full. And this defendant further answering says that the acceptance of the bond and the execution of the contracts by the State text book commission and the approval and acceptance of the bond of this defendant by the executive council of the State of Kansas constitute a complete recognition of the status of this defendant as being lawfully engaged in business within the State of Kansas. That in both the proceeding in the district court of Shawnee county, hereinbefore referred to, and in the case at bar the plaintiff caused summons and process to be issued and served upon the secretary of state as binding upon this defendant, then and thereby recognizing the status of this defendant as a corporation lawful- engaged in business in the State of Kansas. That by reason of the premises the State of Kansas has waived any provision of chapter 10, Laws of 1898, and acts amendatory thereto, not fully complied with by this defendant, if any there be, and has waived the right to object, if any such failure exists upon the part of this defendant, to comply with the laws of this State.

XV.

Defendant further answering says that it asserts and maintains that its business in the State of Kansas is solely that of inter-state commerce, and therefore beyond the regulating control attempted to be exercised by the plaintiff in this suit under the act of 1898, as amended by subsequent statutes. Nevertheless, upon ascertaining the construction and interpretation placed upon said law in May, 1902, by the State of Kansas, through its duly authorized agents and officials, hereinbefore set forth, this defendant, out of a decent regard for the laws of this State, and in good faith attempted to comply with all of the requirements of the laws of the State of Kansas relating to foreign corporations of its class and believes it has fully and completely complied therewith. That if this court should determine
40 that the defendant has failed in any particular to so comply with the laws of the State so as to justify the relief prayed by the plaintiff in whole or in part, then and in that event this defendant here and now tenders full compliance with all of the requirements and prays the court that any judgment adverse to this defendant may be staid for such reasonable time as to enable this

defendant to bring itself within the terms of said act, not already performed, if any there be, and that it may perform its contracts with the State of Kansas and be saved the irreparable loss and damage which a harrassing, inequitable and peremptory judgment of ouster would entail upon this defendant, through no willful fault upon its part. And that in addition the large attendant public inconvenience and loss following the failure to promptly supply to the public schools the text books provided in this defendant's contract may be averted.

ROSSINGTON, SMITH & HISTED,
F. DUMONT SMITH,
A. M. HARVEY,
Attorneys for Defendant.

41 EXHIBIT "A."

This agreement, made and entered into this 31st day of May, A. D. 1902, by and between the State of Kansas, party of the first part, and the American Book Company, a corporation organized under the laws of the State of New Jersey, party of the second part.

Witnesseth, that, whereas, the said party of the second part did on the 6th day of May, 1902, submit its bid for the furnishing of certain school text books for use in the public schools of the State of Kansas under the provisions of article 20, of chapter 92, of the General Statutes of 1901; and

Whereas, said school text book commission did on the 9th day of May, 1902, accept the bid and offer of said party of the second part to furnish the following described books at the following prices, to-wit:

The Elementary Physiology (New Century series), fifty cents.

Now, therefore, in consideration of the adoption of said books for use in the schools of the State of Kansas under the provisions of said law, the said party of the second part hereby contracts, covenants and agrees:

First. That it will, within thirty days after the issuing of a proclamation by the governor of the State of Kansas, announcing the execution of this contract, arrange with at least one dealer or agent at the county seat in each county in the State of Kansas for the handling, sale and exchange of the school books hereinbefore mentioned, which dealer or agent may charge the people of this State a commission of not exceeding ten per cent. on the price above named for the handling and sale of such books. Said second party also agrees that it will furnish said books to any citizen or school district in Kansas at the price above fixed for the sale of such books in cash orders of not less than ten dollars each, and deliver the same at any railroad station in Kansas mentioned in such order.

Second. That said second party will exchange the new books herein contracted to be sold for the corresponding books now in use at not more than fifty per cent. of the maximum price fixed by the provisions of chapter 179 of the Laws of 1897.

42 Third. The books furnished by said party of the second part shall be equal in material, press work, binding and general make up, and the same in matter and contents, as the sample submitted with its said bid.

Fourth. The said party of the second part will during the life of this contract keep on hand and supply to its agents and to purchasrers of said books all the books necessary for use in the schools of the State of Kansas.

Fifth. The State of Kansas shall not be liable to said party of the second part for any sum whatever, but it shall receive its pay and compensation solely and exclusively from the proceeds of the sale of said books.

Sixth. The life of this contract and the time during which it shall be in force and effect shall be five years from the date hereof.

In witness whereof, the party of the first part has caused this agreement to be executed in its behalf by the chairman and secretary of the State school book commission, and said party of the second part has caused the same to be executed by Charles J. Barnes, who is duly authorized and empowered so to do.

AMERICAN BOOK COMPANY,
By CHAS. J. BARNES,
Managing Director,
Party of the Second Part.

FRANK NELSON, *Chairman,*
H. F. M. BEAR, *Secretary,*
Of the State School Text Book Commission,
For the Party of the First Part.

43 EXHIBIT "B."

This agreement, made and entered into this 31st day of May, A. D 1902, by and between the State of Kansas, party of the first part, and the American Book Company, a corporation organized under the laws of the State of New Jersey, party of the second part,

Witnesseth, that, whereas, the said party of the second part did on the 6th day of May, 1902, submit its bid for the furnishing of certain school text books for use in the public schools of the State of Kansas under the provisions of article 20, of chapter 92, of the General Statutes of 1901; and

Whereas, said school text book commission did on the 14th day of May, 1902, accept the bid and offer of said party of the second part to furnish the following-described books at the following prices, to-wit:

The Natural Primary Geography (Kansas edition), thirty cents.

The Natural Complete Geography (Kansas edition), seventy five cents.

Now, therefore, in consideration of the adoption of said books for use in the schools of the State of Kansas under the provisions of said law, the said party of the second part hereby contracts, covenants and agrees:

First. That it will, within thirty days after the issuing of a proclamation by the governor of the State of Kansas, announcing the execution of this contract, arrange with at least one dealer or agent at the county seat in each county in the State of Kansas for the handling, sale and exchange of the school books hereinbefore mentioned, which dealer or agent may charge the people of this State a commission of not exceeding ten per cent. on the price above named for the handling and sale of such books. Said second party also agrees that it will furnish said books to any citizen or school district in Kansas at the price above fixed for the sale of such books in cash orders of not less than ten dollars each, and deliver the same at any railroad station in Kansas mentioned in such order.

Second. That said second party will exchange the new books herein contracted to be sold for the corresponding books now in use at not more than fifty per cent. of the maximum prices fixed by the provisions of chapter 179 of the Laws of 1897.

44 Third. The books furnished by said party of the second part shall be equal in material, presswork, binding and general makeup, and the same in matter and contents, as the sample submitted with its said bid, except as to such changes as have been agreed upon between the said American Book Company and the committee of the text book commission appointed for that purpose, a list of which changes, now on file in the office of the superintendent of public instruction of the State of Kansas, is hereby made a part of this agreement.

Fourth. The said party of the second part will during the life of this contract keep on hand and supply to its agents and to purchasers of said books all the books necessary for use in the schools of the State of Kansas.

Fifth. The State of Kansas shall not be liable to said party of the second part for any sum whatever, but it shall receive its pay and compensation solely and exclusively from the proceeds of the sale of said books.

Sixth. The life of this contract and the time during which it shall be in force and effect shall be five years from the date hereof.

In witness whereof, the party of the first part has caused this agreement to be executed in its behalf by the chairman and secretary of the State school text book commission, and said party of the second part has caused the same to be executed by Charles J. Barnes, who is duly authorized and empowered so to do.

AMERICAN BOOK COMPANY,
By CHARLES J. BARNES,
Managing Director,
Party of the Second Part.

FRANK NELSON, *Chairman,*
H. F. M. BEAR, *Secretary,*
Of the State School Text Book Commission,
For Party of the First Part.

45 EXHIBIT "C."

This agreement, made and entered into this 31st day of May, A. D. 1902, by and between the State of Kansas, party of the first part, and the American Book Company, a corporation organized under the laws of the State of New Jersey, party of the second part,

Witnesseth, that, whereas, the said party of the second part did on the 6th day of May, 1902, submit its bid for the furnishing of certain school text books for use in the public schools of the State of Kansas under the provisions of article 20, of chapter 92, of the General Statutes of 1901; and

Whereas, said school text book commission did on the 16th day of May, 1902, accept the bid and offer of said party of the second part to furnish the following-described books at the following prices, to-wit:

Appleton's First Reader, ten cents,
Appleton's Second Reader, seventeen cents,
Appleton's Third Reader, twenty-three cents.
Appleton's Fourth Reader, thirty cents.
Appleton's Fifth Reader, forty cents.

Now therefore, in consideration of the adoption of said books for use in the schools of the State of Kansas under the provisions of said law, the said party of the second part hereby contracts, covenants and agrees;

First. That it will, within thirty days after the issuing of a proclamation by the governor of the State of Kansas, announcing the execution of this contract, arrange with at least one dealer or agent at the county seat in each county in the State of Kansas for the handling, sale and exchange of the school books hereinbefore mentioned, which dealer or agent may charge the people of this State a commission of not exceeding ten per cent. on the price above named for the handling and sale of such books. Said second party also agrees that it will not furnish said books to any citizen or school district in Kansas at the price above fixed for the sale of such books in cash orders of not less than ten dollars each, and deliver the same at any railroad station in Kansas mentioned in such order.

46 Second. That said party will exchange the new books herein contracted to be sold for the corresponding books now in use at not more than fifty per cent. of the maximum prices fixed by the provisions of chapter 179 of the Laws of 1897.

Third. The books furnished by said party of the second part shall be equal in material, presswork, binding and general make up and the same in matter and contents, as the sample submitted with its said bid, except as to such changes as have been agreed upon between the said American Book Company and the committee of the text book commission appointed for that purpose, a list of which changes, now on file in the office of the superintendent of public instruction of the State of Kansas, is hereby made a part of this agreement.

Fourth. The said party of the second part will during the life of this contract keep on hand and supply to its agents and to purchasers of said books all the books necessary for use in the schools of the State of Kansas.

Fifth. The State of Kansas shall not be liable to said party of the second part for any sum whatever, but it shall receive its pay and compensation solely and exclusively from the proceeds of the sale of said books.

Sixth. The life of this contract and the time during which it shall be in force and effect shall be five years from the date hereof.

In witness whereof, the party of the first part has caused this agreement to be executed in its behalf by the chairman and secretary of the State school text book commission, and said party of the second part has caused the same to be executed by Charles J. Barnes, who is duly authorized and empowered so to do.

AMERICAN BOOK COMPANY,
By CHAS. J. BARNES,
Managing Director,
Party of the Second Part.

FRANK NELSON, *Chairman,*
H. F. M. BEAR, *Secretary,*
Of the State School Text Book Commission,
For Party of the First Part.

47 EXHIBIT "D."

Know all men by these presents, that we, The American Book Company, a corporation organized under and by virtue of the laws of the State of New Jersey, as principal, and The American Bonding & Trust Company, as surety, are held and firmly bound unto the State of Kansas in the penal sum of twenty-three thousand, five hundred dollars, for the payment of which sum well and truly to be made we bind ourselves jointly and severally, together with our successors and assigns.

The condition of the foregoing obligation is such, that whereas, the said American Book Company was on the 7th, 14th and 16th days of May A. D., 1902, awarded by the school text book commission of the State of Kansas, contracts for furnishing to the schools of the State of Kansas, under provisions of chapter 179 of the Laws of 1897, as amended by chapter 31 of the Laws of 1898.

"Appleton's First Reader, ten cents each.
Appleton's Second Reader, seventeen cents each.
Appleton's Third Reader, twenty-three cents each.
Appleton's Fourth Reader, thirty cents each.
Appleton's Fifth Reader, forty cents each.
The Elementary Physiology (New Century series) fifty cents each.
The Natural Primary Geography (Kansas edition), thirty cents each.

The Natural Complete Geography (Kansas edition), seventy five cents each;"

and has entered into contracts with the State of Kansas obligating it so to furnish said books at said prices for the ensuing period of five years.

Now, therefore, if the said American Book Company shall well and faithfully abide by and perform the conditions and obligations of said contract, and shall in all things comply with the terms and provisions of the same, and with all the terms and provisions of said chapter 179 of the Laws of 1897 as amended by chapter 31 of the Laws of 1898, then this obligation shall be null and void; otherwise to be in full force and effect.

48 In witness whereof, the said American Book Company has caused this instrument to be executed by Charles J. Barnes its managing director, who is duly authorized so to do, and the surety has caused the same to be executed by its duly authorized officers and agents.

AMERICAN BOOK COMPANY, *Principal*,
By CHARLES J. BARNES, *Managing Director*.

[Seal American Bonding & Trust Co.]

THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY, *Surety*,
By J. W. THURSTON, *Vice-President*.
Attest: JOHN V. ABRAHAMS, *Assistant Secretary*.

49 STATE OF KANSAS, } ss:
Shawnee County, }

On this 31st day of May, A. D. 1902, before me, the subscriber, a notary public in and for the county of Shawnee and State of Kansas, came J. W. Thurston, vice-president, and John V. Abrahams, assistant secretary, of the American Bonding and Trust Company of Baltimore City, in the State of Kansas, to me personally known to be the individuals described in and who executed the preceding instrument as vice president and assistant secretary, respectively, and they each duly acknowledged the execution of the same, and by me being duly sworn, severally and each for himself deposeth and saith that they are the vice-president and assistant secretary, respectively, of the company as aforesaid, for the State of Kansas, and that the seal affixed to the preceding instrument and their signatures as such vice-president and assistant secretary, respectively, were duly affixed and subscribed to the said instrument by the authority and under the direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year last above written.

JENNIE C. ROSEN,
Notary Public.

My commission expires July 16, 1904.

50 (Endorsed on back:) No. 13,194. Supreme court State of Kansas *ex rel., vs.* American Book Company. Answer. Filed July 18 1902. D. A. Valentine, clerk sup. court Rossington, Smith & Histed, attorneys for defendants.

51 And afterwards, and on the 19th day of July, 1902, the plaintiff filed in said supreme court its motion to strike out certain portions of the defendant's answer, which said motion is in words and figures following:—

In the Supreme Court of the State of Kansas.

STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } No. 13194.

Motion.

Comes now the plaintiff and moves the court to strike out and expunge from the record all of the defendant's answer, except paragraph ten as follows, to wit: sections 2, 3, 3½, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and the exhibits thereto attached for the reason that said sections of its said answer are not responsive to the complaint of the plaintiff filed herein, are inconsistent with the only answer the complaint admits of, and in no wise do the same nor any of them constitute a justification of the right of defendant as against the plaintiff, and the same do not constitute a proper answer to plaintiff's complaint. And it will ever pray.

GALEN NICHOLS, *Co. Att'y,*
Att'ys for Plaintiff.

(Endorsed:) 13194.—The State of Kansas, *ex rel. vs.* The American Book Company—Motion—Filed Jul- 19, 1902, D. A. Valentine, clerk supreme court—

52 And afterward, and on the 19th day of July, 1902, the plaintiff filed its reply to the answer of defendant in the words and figures, following:

In the Supreme Court of the State of Kansas.

STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } No. 13194.

Reply.

Comes now the said plaintiff and for its reply to the answer of the defendant herein says:—

1. The plaintiff admits that the defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

2. That it denies the allegations in paragraph or section ten of defendant's answer.

3. Wherefore and by reason of the same it demands judgment against defendant as prayed for in its petition.

GALEN NICHOLS, *Co. Att'y,*
Att'ys for Plaintiff.

(Endorsed:) 13194.—The State of Kansas *ex rel.* Co. Att'y Shawnee Co. *vs.* The American Book Company.—Reply—Filed Jul- 19 1902 D A. Valentine, clerk supreme court.—

53 And afterwards, to-wit, on Monday the 21st day of July, 1902, the same being one of the regular judicial days of the July 1902 term of the supreme court of the State of Kansas, court being in session at its court room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable W. R. Smith and Honorable A. L. Greene, justices, the following proceeding was had and remains of record at page 169 of Journal "FF" of the said supreme court in words and figures following:

THE STATE OF KANSAS *ex Rel.*, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } 13194.

This cause comes on to be heard on the pleadings filed herein, and thereupon after oral argument by E. S. & A. B. Quinton for the plaintiff and by Cliff Histed and F. Dumont Smith for the defendant and after due consideration by the court, it is ordered that the defendant The American Book Company, be ousted from the exercise of the right to transact business as a corporation in the State of Kansas until its compliance with the statutes of this State providing for the making of an application to the charter board of the State to do such business, and the filing of a certified copy of its charter or articles of incorporation, and a statement of the matters and things required by section 2, of chapter 10 of the Special Laws of

1898 and the payment of the fees required by law; and it is further ordered that the prayer of plaintiff's petition asking for the annulment of the contract made by said defendant with the State text book commission be denied.

54 And on the same day to-wit: the 21st day of July, A. D. 1902 the said supreme court of Kansas handed down and filed in the office of the clerk of the said supreme court their written opinion in said action, which opinion is in words and figures following:

55 No. 13194.

Division Two, July, 1902.

Doster, C. J., Smith and Greene, JJ.

THE STATE OF KANSAS *ex Rel.* vs. THE AMERICAN BOOK COMPANY. } Original Proceeding in *Quo Warranto*. Writ Allowed.

Opinion per Curiam.

In this case the plaintiff seeks to oust the defendant from the prosecution of the business of selling and contracting for the sale of school books, and to annul a contract recently made by it with the State text book commission for supplying certain school books. The grounds of the application are, that the defendant, as a foreign corporation, has not complied with chapter ten of the Laws of the Special Session of 1898, and the amendatory statute of 1901, entitling it to do business in the State.

The company has complied, although irregularly, informally and out of time, with the law, except as to section two of chapter ten of the Laws of 1898. As to those particulars in which compliance has been attempted, but not technically executed, the statute is directory.

Section two, just mentioned, requires the making of an application to the charter board and the furnishing of certain information to such board. These things the company must do in order to acquire the status of a foreign corporation authorized to do business here. The statute requires the doing of these things by foreign corporations "seeking to do business in this State." Inasmuch as the defendant had been doing business in this State before the enactment of the law, it contends that it was not "seeking to do business" here. It contends that the words "seeking to do business"
56 apply only to corporations which had not theretofore done business, but desired to do it in the future. This is an erroneous view. The statute does not mean to thus discriminate in the requirements of section two above adverted to, and in other like matters, between foreign corporations which had theretofore been

doing business here, and those which might thereafter apply to do business.

The claim that because the defendant company is engaged in interstate trade it cannot be subjected to the regulations of the statute of 1898, is untenable. It may be that it cannot be excluded from doing interstate business here, but it can be laid under such reasonable conditions as the filing of its charter, the payment of charter-fees, the making of reports and furnishing of information concerning its business, the appointment of agents to receive service of process, etc. These are not burdens on the company; they are measures of justice and protection to the people of the State.

The plaintiff cannot, in this action, have an annulment of the contract already made. It may be that there are equitable circumstances forbidding the cancellation of such contract. It may be that compliance with the law by the defendant hereafter will retroactively validate the contract in the event it should now be invalid. However, independently of such consideration, we do not have jurisdiction over that branch of the case. Our jurisdiction is in *quo warranto* alone. A grant of that jurisdiction does not authorize the joinder to a cause of action for ouster of another one for the annulment of a contract, merely because the subject matter of the latter possesses incidental connection with the subject matter of the former.

The defendant will be ousted of its claimed rights to do business in this State until it complies with the requirements of the law, but the prayer of the petition for the annulment of the contract will be denied.

(Endorsed:) 13194. The State *ex rel.*, *vs.* The American Book Co., Original *quo warranto*. Opinion—*per curiam*. Judgment of ouster. Filed July 21 1902. D. A. Valentine, clerk supreme court.

57 And afterwards, to-wit, on the 2nd day of August A. D. 1902, the plaintiff in said action filed its motion for an order of citation issued to said defendant and H. L. Shirer and — Alfred, its agents, requiring them to show cause why they should not be held guilty of contempt, which said motion is in words and figures following, to wit:

58 In the Supreme Court of the State of Kansas.

STATE OF KANSAS on the Relation of GALEN NICHOLS, County Attorney of Shawnee County, Kansas, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
} No. 13194.

Motion.

Comes now Galen Nichols, county attorney of Shawnee county, attorney for the above named plaintiff, and informs the court that

the said defendant, The American Book Company, has shipped into the city of Topeka to the Kansas Book Company, and to its agents, H. L. Shirer and — Alfred, a car load or more of books, intended for sale and distribution in the State of Kansas, which said car load of books was received by said Alfred and Shirer in the city of Topeka on the 31st day of July, 1902, which said shipment of books, receipt and care for the same by the said Alfred and Shirer is in direct violation of the order of ouster issued against the said defendant by this honorable court on the 11 day of July 1902, said defendant not having complied with the order of said court of July 21, 1902 and is in contempt of said court. He therefore, asks that a citation issue from this court to said defendant, The American Book Company and to Alfred and Shirer, requiring them to show cause why they should not be held guilty of contempt.

GALEN NICHOLS,
County Attorney.

(Endorsed:) 8/2/02 Citation may issue returnable on Sept. 16th, 1902. W. A. J. 13,194. State *vs.* Am. Book Co. Motion for citation. Filed—Aug. 2—1902—D. A. Valentine clerk supreme court—

59 Be it remembered, that on Saturday, August 2nd, before Hon. William A. Johnston, justice of the supreme court of the State of Kansas at his chambers in the city of Topeka, the following proceeding was had and remains of record at page 185 of Journal "FF" of this court and is in words and figures following, to-wit:

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
} No. 13194.

Now comes Galen Nichols, county attorney of Shawnee county, on whose relation this cause was brought, and informs the court that said defendant herein, The American Book Company has shipped into the city of Topeka and to the Kansas Book Company and its agents H. L. Shirer and —— Alfred, a car load or more of books, and that the same are intended for sale and distribution in the State of Kansas, and are now in the care, custody and control of said —— Alfred and H. L. Shirer, as agents; and also presents his written motion for an order of this court for the issuance of a citation to the said defendant, The American Book Company and to —— Alfred and H. L. Shirer its agents, requiring them to appear and show cause why they should not be held guilty of contempt of a certain judgment of ouster heretofore rendered against them by this court on the 11th day of July 1902. And thereupon after due consideration and for good cause shown, it is *ordered* that the motion for an order for issuance of a citation for contempt be allowed and the clerk

is hereby ordered to issue under his hand and seal a citation to the defendant, The American Book Company and to —— Alfred and H. L. Shirer their agents, requiring them to appear on the 16th day of September, A. D. 1902 and show cause why they are not guilty of contempt of the judgment of this court.

60 And thereupon, on the said 2nd day of August, 1902 pursuant to the above and foregoing order a citation was issued to —— Alfred and H. L. Shirer out of the said supreme court of Kansas and returned to said court on the 4th day of August, 1902 which said citation with the return of the secretary of state and all endorsements thereon is in words and figures following, to-wit:

61 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Kansas, Plaintiff.
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant.
} No. 13194.

Citation.

To Geo. A. Clark, secretary of state, Greeting:

You are hereby commanded to notify —— Alfred and H. L. Shirer, agents of The American Book Company, defendant above, that an order has been entered in the above entitled cause, on this date, by Hon. W. A. Johnston, one of the justices of this court, citing —— Alfred and H. L. Shirer to appear and show cause why they are not in contempt of the orders of said court as shown by the motion on file, on September 16th, 1902 at 9 o'clock a. m. Hereof fail not under penalty of the law.

[SEAL.] Witness my hand and the seal of the supreme court of Kansas, hereto affixed at my office in Topeka, this 2nd day of August, 1902.

D. A. VALENTINE,
Clerk Supreme Court,
By H. L. ARMSTRONG, *Deputy.*

STATE OF KANSAS,
Executive Department.

OFFICE OF THE SECRETARY OF STATE.

I received the within writ August 2nd, 1902, and I hereby certify that on the 4th day of August, 1902, I made service of the same on the within named —— Alfred and the within named H. L. Shirer in Shawnee county Kansas by transmitting to each of said persons a true copy of the within writ with all of the indorsements thereon

duly certified; the same being transmitted from my office to the office of said persons by messenger.

[SEAL.] Witness my hand and official seal this 4th day of August, A. D. 1902.

GEO. A. CLARK,
Sec'y of State.

(Endorsed:) No. 13,194. Supreme court of Kansas. State *ex rel.* pl'ff *vs.* The American Book Company. def't. Citation. Issued Aug. 2, 1902. Returnable according to law. Filed August 4 1902. D. A. Valentine clerk supreme court. Original.

62 And thereupon, and on the same day, to-wit, the 2nd day of August A. D. 1902 a citation was issued to the American Book Company, in words and figures as follows:

63 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Kansas, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 13194.

Citation.

To Geo. A. Clark, secretary of state, Greeting:

You are hereby commanded to notify The American Book Company, defendant, that an order has been entered in the above entitled cause, on this date, by Hon. W. A. Johnston, one of the justices of this court, citing said American Book Company to appear and show cause why it is not in contempt of the order of said court as shown by the motion on file, on September 16th, 1902, at 9 o'clock, a. m. Hereof fail not under penalty of the law.

Witness my hand and the seal of the supreme court of Kansas, hereto affixed at my office in Topeka, this 2nd day of August, 1902.

[SEAL.] D. A. VALENTINE,
Clerk Supreme Court,
By H. L. ARMSTRONG, *Deputy.*

STATE OF KANSAS, }
Executive Department. }

OFFICE OF THE SECRETARY OF STATE.

I, Geo. A. Clark, secretary of state of the State of Kansas, do hereby certify that I received the within writ on the 2nd day of August 1902, and that on the 4th day of August, 1902, I served the same on the within named defendant, The American Book Com-

pany, by transmitting by registered mail to the secretary of said defendant at New York city, N. Y. a true copy of the within writ with all of the indorsements thereon duly certified.

Witness my hand and official seal this 4th day of August, A. D. 1902.

[SEAL.] GEO. A. CLARK,
Sec'y of State.

(Endorsed:) 13194. Supreme court of Kansas. State *ex rel.*, pl'ff, *vs.* The American Book Co. def't. Citation. Issued Aug. 2, 1902. Returnable according to law. Original. Filed Aug. 4, 1902 D. A. Valentine clerk supreme court.

64 And afterwards to-wit, on the 6th day of August 1902 the defendant in the above entitled action filed in the office of the clerk of said supreme court and made a part of the record herein a bill of exceptions which, with the endorsements thereon is in words and figures following, to-wit:

65 13194.

Filed Aug. 6, 1902. D. A. Valentine, Clerk Supreme Court.

Be it remembered, that on Monday, the twenty-first day of July, 1902, the same being one of the judicial days of the regular July 1902 term of the supreme court of the State of Kansas, the above entitled cause came regularly on for trial upon the issues theretofore therein joined, before the second division of said supreme court, Doster, C. J., and Smith and Greene, JJ., presiding.

The plaintiff appeared by Mr. Galen Nichols, county attorney of Shawnee county, and Messrs. A. B. Quinton and E. S. Quinton.

The defendant appeared by Mr. Charles Blood Smith, Mr. Clifford Histed, Mr. F. Dumont Smith, Mr. A. M. Harvey and Mr. H. G. Larimer.

And thereupon the following proceedings were had:

Mr. E. S. Quinton stated the cause of the plaintiff to the court.

66 Mr. QUINTON: It is our contention that the burden of proof in this case is upon the defendant.

Mr. HISTED: We don't see it that way. We insist that the burden is not upon us, but is upon the State.

Chief Justice DOSTER: We decided some time ago, in a case where a physician was prosecuted for practicing medicine without a license, or authority issued by the State medical board, that it was incumbent upon him to produce the evidence of his authority to practice. That was under the general rule that where one claimed a license or permit to do business, he being in possession of the evidence of it, was better able to produce it. It does not come under the ordinary rule. You claim that you were authorized to do business in this

State. It is probable that some paper evidence of that authority to do business is issued by the secretary of state. At any rate, whether a license or permit is issued, the evidence of your right to do business is practically within your knowledge more than that of the other party. So far as that one point is concerned, the burden is on the defendant.

Mr. HISTED: The defendant desires to take exception to that ruling of the court because it is a denial to the defendant of the equal protection of the laws and a denial to the defendant of due process of law within the meaning of the fourteenth amendment to the Constitution of the United States.

Mr. QUINTON: We have filed a motion to strike out portions of their answer and should like a ruling on that before we proceed any further.

Chief Justice DOSTER: For the purpose of shortening the work of the case and without passing on the merits of the motion that has been filed, we have concluded that that motion may be overruled; so if you have an issue of fact to raise against the part of the
67 answer to which this motion was filed, you would better amend your reply, or if you wish to stand on your general denial already in as applicable to that part of the answer, you can do so.

Mr. QUINTON: That is what we wish to do. We also wish to take exceptions to the ruling of the court.

Chief Justice DOSTER: We understand that on their side, they apply their general denial they already have in to the whole of the answer. Just now it may be treated as amended. Let me say this, gentlemen, that so far as one question that the defense in this case wishes to raise is concerned, the court is ready to pass on it and it may be passed on for the purpose of shortening the work of the case. Whether this corporation is engaged in interstate commerce or not, or, rather, assuming it to be engaged is what is called interstate commerce business, we shall hold that it is subject to reasonable legislation and regulation. That is the law. That is the decision of the Federal courts. While a corporation is engaged in interstate commerce and may not be excluded wholly from the State—must be allowed to do business in the State—that is, interstate business—yet all the holdings are that it is subject to reasonable regulation.

Mr. HISTED: Your honor's suggestions leave me in some doubt as to the course of proceedure, whether or not the court decides at this time that the answer as pleaded in paragraph 3, constitutes no defense. I take it that that is what the court has decided, and that no evidence will be permitted on that point.

Chief — DOSTER: If you mean by that to interpose the objection that you are engaged in interstate trade and therefore are not subject to regulations of this Bush act, then you are correct—it is no defense.

Mr. HISTED: The requirements of the Bush act are various, as applied even to foreign corporations, and of course, with the
68 general statement which your honor makes of the view of the law, it may or may not be applicable to this defense.

Chief Justice DOSTER: The State in this case makes three claims. One is that you were required to apply for permission to do business, refiling your New Jersey charter or something like that, and on doing that you could obtain a permit to transact business here. Another is that you were required to file reports of your business; and another is that you were required to file an irrevocable power of attorney, appointing some person upon whom service can be made; and that you did not do any one of those things, and for that reason that you should be ousted.

Mr. HISTED: There is also the other requirement which I suppose your honor included within the first; that is, that we shall pay a certain fee, conditioned on the amount of the charter. I suppose the court also holds that that is incumbent upon the company.

Chief Justice DOSTER: We had not heard that matter discussed.

Mr. HISTED: The only time they have to file a charter is when they are corporations that did not or were not doing business in Kansas prior to 1898.

Chief Justice DOSTER: Does the law hold the same requirement as to domestic corporations?

Mr. HISTED: Yes sir.

Chief Justice DOSTER: I do not see why that may not be valid legislation. It makes no discrimination between domestic and foreign corporations in that particular.

Mr. HISTED: I am only attempting to find out exactly the view of the court, so as to meet that view.

Chief Justice DOSTER: That is my particular view. The
69 other justices have the same view I expressed. There is no attempt by that act to discriminate as to foreign corporations.

Mr. HISTED: To get this question so we will understand it, do I understand the court would sustain an objection to any evidence offered under paragraph 3 of this answer?

Chief Justice DOSTER: Yes sir.

Mr. HISTED: To which ruling of the court the defendant objects and excepts, because the business of the defendant is within the protection of section 8 of article 1 of the Constitution of the United States, as pleaded.

Mr. HISTED: The next defense is a legal defense which I take it the court will sustain on the same line. This defense refers to the other and refers to those contracts which were made prior to the passage of the Bush act and some of which are still in force, those contracts being, as your honors will remember from my statement, contracts regulating the price at which this American Book Company would sell its publications to various people, school districts, etc., contracts which we contend are merely incidental to its interstate commerce. The contention of the defendant in paragraph 3½ briefly is that in so far as the court puts a construction upon the law of 1898 as authorizing this court, under that law, to oust the company from doing business within the State of Kansas, it is a law impair-

ing the obligation of a contract, and therefore is violative of section 10 of article 1 of the Constitution.

Chief Justice DOSTER: You took contracts extending over a term of years which have not yet fully expired?

Mr. HISTED: Yes sir.

Mr. QUINTON: Are those pleaded here?

Mr. HISTED: Yes sir.

Chief Justice DOSTER: And you are asked to be ousted from your franchise to fulfill those contracts as well as other business?

70 Mr. HISTED: Yes sir.

Justice SMITH: Do you think this would have the effect you state if you were ousted?

Mr. HISTED: The judgment asked by the plaintiff is absolute prohibition to this company from coming into the State of Kansas and doing any business in the State of Kansas.

Mr. QUINTON: We do not complain of any contract made by this company prior to the passage of the Bush law. We complain only that they failed to comply with the Bush act and by reason of that failure they have no right to do business. Of course, if they had contracts in the State before that law was passed, there is nothing in this proceeding that can touch those, and if the court would overrule that part of their defense, it would simply inject into this case something that is not contemplated.

Chief Justice DOSTER: You don't ask that the company be ousted from its franchise to fulfill the old contracts?

Mr. QUINTON: No sir, we do not. We simply complain of their right to do business under this act. That is another matter. The court cannot determine what contracts it affects now and what it don't affect.

Mr. HISTED: Have we a right in trying this case to adopt the same rules of proceedure and evidence that would obtain in a district court and to interpret the position of the party by his pleadings and the orders obtained, and has he a right to come in and interpret them on the trial?

Chief Justice DOSTER: Where a party disavows an intention to ask certain relief, the court will act upon his disavowal. They disavow any intention to oust you from the fulfillment of those old contracts. We will bear that in mind when we come to render judgment, in case it should be adverse to you in any particular.

Mr. HISTED: The injunction is as broad as the prayer of the petition.

71 Chief Justice DOSTER: I am by no means clear that you are protected as to those old contracts, but we will bear that in mind when we come to render judgment. We think you would better proceed to offer your evidence, Mr. Histed, to show your authority to transact business in this State.

Mr. HISTED: We have some other defenses here. I do not see how we can intelligently try the case unless the court knows the issues.

Chief Justice DOSTER: They only object to you because you have

no authority to transact business. Whatever defense you may have outside of this it seems to us unnecessary to present. Show us now that you have complied with the requirements of our statute and have authority to transact business. If you have, that is the end of the case. You don't have to go to your other defenses.

Mr. HISTED: If the court does not care to hear the rest of the defenses, I will not press them.

Chief Justice DOSTER: We may after a while.

Mr. HISTED: I might say to your honors that we have no frivolous plea here. We have not attempted to inject into this case matters which we think are not matters well taken, and we expected to invite your honors' attention to our case—not our case in part, but the whole case—before your honors determined our rights.

Chief Justice DOSTER: If you are unable to sustain your rights to do business here because you have not complied with the law, and you think then that over and beyond that you have some defense, we will hear it; but for the present, go to this question.

72 F. DUMONT SMITH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination.

Questions by Mr. HISTED:

Mr. HISTED: I desire to offer in evidence a receipt, signed by the secretary of state, on May 12, 1902, and another one dated May 31, 1902.

Mr. QUINTON: The receipts are from Mr. Clark, secretary of state. We object to them as incompetent, irrelevant, immaterial, and not the best evidence. This is a receipt to Mr. Harvey for a filing with the secretary of state of a power of attorney. The power of attorney itself is the best evidence. The second paper offered is a receipt for a statement filed by the defendant company on May 31, 1902. That is not the best evidence, and is incompetent, irrelevant and immaterial; the statement itself is the best evidence.

Chief Justice DOSTER: If that paper is in the nature of a license or permit, such as issued by many officers, to do certain things, that is admissible evidence; but if it is a mere receipt, it would seem that the paper for which it is a receipt is the best evidence. Is there any reason why you might not produce the paper filed with the secretary of state?

Mr. HISTED: No sir.

Chief Justice DOSTER: There seems to be a disposition to be technical in this case, and not merely that, but to consume time. We won't permit that. We want you to go direct to the merits of the case. Bring up that evidence which you as lawyers recognize as admissible and proper, and offer it to the court.

73 Mr. HISTED: We offer this document in evidence.

Chief Justice DOSTER: We will receive it. We will receive

that, and if you think that the paper on file in the secretary's office ought to be offered, we will receive that. If there is any doubt about it, you would better offer it.

Mr. HISTED: We will offer it in deference to your honor's suggestion.

Said two papers offered in evidence were marked for identification as Exhibits 1 and 2 respectively, and are in words and figures as follows, to-wit:

Duplicate.

"STATE OF KANSAS,
Executive Department.

— SECRETARY OF STATE,
TOPEKA, *May 31st*, 1902.

I, George A. Clark, secretary of state, do hereby certify that the annual report of the American Book Company, of New York City, for the year ending May 30, 1902, has been made, as required by the laws of the State of Kansas relating to corporations, and is on file in this office.

[SEAL.]

GEO. A. CLARK,
Secretary of State,
By A. J. WHITMORE,
Chief Clerk."

"STATE OF KANSAS,
Executive Department.

OFFICE OF SECRETARY OF STATE,
TOPEKA, KANSAS, *May 12th*, 1902.

Received of A. M. Harvey resolution of the board of directors and the consent to accept service of process from the secretary of state of the State of Kansas, "The American Book Company," a corporation, whose principal office is at Newark, New Jersey. Such papers were filed in the office of the secretary of state on May 5th, 1902.

GEO. A. CLARK,
Secretary of State,
Per A. J. WHITMORE,
Chief Clerk."

74 Q. Mr. Smith, in the spring of 1902, did you have any connection with the American Book Company?

A. Yes sir, I was attorney for the company at that time.

Q. With what business of the company?

A. In connection with the making of bids for the text book commission, the preparation of bids, making the contracts, and looking after the details.

Q. In reference to that employment, did you have any conversation with or statements from or interview with any of the executive departments of the State, and if so, with whom?

A. Yes sir, with the attorney general, State superintendent, who was *ex officio* chairman of the text book commission, the secretary of the commission, and with members of the charter board at different times.

Q. When did you have your first interview, and with whom?

A. I think the first interview was about the first or second of May. I went into the secretary of state's office to look into the question of whether it was necessary for the company——

Mr. QUINTON: I object to that; it is not an answer to the question.

Mr. HISTED: This leads to the interpretation put upon the law. It is a defense your honor did not hear in this connection. It is a question of good faith on the part of this corporation and what they did and why they did it.

Chief Justice DOSTER: Are you going to claim you were misled by an opinion of the attorney general or some of his assistants?

Mr. HISTED: Certainly we will. We don't think we were misled. We say there has been a practical interpretation put upon this law and that we followed that interpretation and brought ourselves clearly within the terms of that statute, and that it would be an act of bad faith for the State now to put a different interpretation upon that law.

Mr. QUINTON: They did not apply to the attorney general
75 or to the charter board until four years after this law was passed. I don't think they showed much good faith in that respect. Even if they had, I don't think it would be binding upon us.

Chief Justice DOSTER: It seems somewhat questionable to us, gentlemen, but perhaps, inasmuch as the right of ouster is discretionary with the court, it may advise the court in the exercise of that discretion that one has been misled by the officers. We will hear you. Be brief, however.

Mr. QUINTON: We except to the ruling of the court.

The WITNESS: I went first to the secretary of state's office and was there referred to the attorney general, and on the same day I had an interview with the attorney general regarding the matter of the requirements that would be made for the company's bidding before the text book commission. He informed me that as he construed the Bush law, a company that had been doing business in the State at the time of the enactment of that law could come in by filing at any time its irrevocable consent to be sued and making the proper report contemplated in the statute; that as he regarded the law, time was not of the essence of it; that the purpose of the law was simply to see that the corporation was not insolvent. He said, however, that that requirement would not be made at the time the bids were made to the text book commission—in other words, that foreign corporations that had not complied with the law would be allowed to bid and their bids would be received and considered the same as those that were residents of the State; but he suggested that we should comply with the law so far as the filing of our consent to be

sued, for the reason that there were certain penalties and obligations accruing to the bidder failing to make the contract which the bid called for, which would be difficult of enforcement unless the corporation were in the State so it could be sued here. He also
76 stated to me that up until that time no non-resident corporation bidding or receiving contracts from the text book commission had been required to comply with the law, and only one of them had done so. He said further that his interpretation, as I have outlined it, had been followed by the charter board all the way through, and that a number of corporations had come in and been admitted to do business, filing their consent and report after the time apparently fixed by the statute; that that had been the universal custom and there had been no exception to that custom in the practice of the charter board.

Q. Was that before any bidding had been made by the American Book Company?

A. Yes sir.

Q. What is the next thing you did with reference to this question with any of the executive departments?

A. We filed the irrevocable consent, shown by that certificate, and received the receipt——

Mr. QUINTON: We object to that as incompetent, irrelevant, immaterial and not the best evidence.

The WITNESS: After the bids were accepted and while the matter of the contract was pending, Mr. Nelson, the chairman of the commission, stated to me it would be necessary for us to fully comply with the law before any contracts would be signed, and referred me to the attorney general. I went to the attorney general and he stated to me that his department had ruled that no contracts would be signed with non-resident corporations that had not complied with the Bush law so far as filing its consent to be sued and filing its report, on the theory that any corporation that had been doing business was in the same situation we were. I asked him then if that was all that would be required of the American Book Company as a condition precedent to the securing of its contracts, whether any other or further requirements would be made of them, or whether this would fully satisfy the law as interpreted by him and according to the custom of the executive departments that had the mat-
77 ter in charge, and he said that was all that was necessary under the law and no other or further requirements would be made of us, and if we at that time filed our annual report, he would prepare the contracts and advise the president and secretary of the text book commission to execute them. We then filed the report, of which the certificate has been offered in evidence. Contracts were prepared by the attorney general and executed in duplicate by both parties and received by us. We prepared and filed our bond and that was approved by the executive council.

Mr. QUINTON: I move to strike out the latter portion of the answer of the witness as incompetent, irrelevant and immaterial.

Q. Now, with reference to any inquiry as to the status of this defendant corporation as being one engaged in business prior to the Bush act, what if anything was done?

A. On or about the 30th or 31st day of May, at the time this report was filed, the charter board was convened. The attorney general had required of us—said to me he should require of us some evidence of the fact that we were doing business within the State of Kansas at the time the Bush law was enacted, and the character and extent of that business, so as to know whether the American Book Company was within the purview of that act and could come in under those provisions. I furnished an affidavit showing the character and extent of our business at and prior to the passage of that law and since that time. The charter board was reconvened and the affidavit was submitted to them in my presence, and the charter board considered it and directed the secretary of state to issue this certificate. I cannot say what action was taken by the board as a body as recorded, but the different members expressed themselves as satisfied with the showing, and directed the secretary to issue that certificate. All this was done prior to the execution of those contracts and the tendering and approval of the bond set forth in our answer. Following that, the contracts were made and the bond supplied.

78 Q. State, as representing the American Book Company, if you relied upon the interpretation placed upon the law by the attorney general and the other departments of the Government, as you have narrated them?

A. Entirely.

Q. Did you have any purpose or disposition to evade any provision of the corporation act?

A. No sir, our purpose was to comply with every requirement that the department made of us. I had expected that we might have to come in under the other provisions of the law, because I was not aware of what the ruling of the department had been. My purpose—we were prepared at any time to do that if the department had required that. My purpose in going to the department as often and consulting with them as fully as I did was that we might satisfy every requirement of the laws of Kansas with reference to these contracts.

Q. As I understand, the attorney general interpreted that law and held that the period of time within which reports might be filed, as provided in the statute, was directory and not mandatory?

A. Yes sir.

Q. And he held that the other requirements, as to filing a charter and paying the fees, did not apply to corporations engaged in business before the act was passed?

A. With reference to the matter of time, he said to me that his interpretation of the law was—the purpose of this act so far as it applied to non-resident corporations was to insure that corporations coming into the State and doing business and undertaking obligations were solvent and able to fulfill their obligations, and that their

consent to be sued was good at any time, and a contract filed beyond the time specified by the statute complied with the spirit of the law.

79 Cross-examination.

Questions by Mr. QUINTON:

Q. When did you have this conversation you are speaking of?

A. The first conversation with the attorney general was in the first days of May, within a day or two of the meeting of the commission.

Q. What year?

A. 1902.

Q. You made a statement and affidavit that you had been doing business in this State for ten years prior to that time. Is it not a fact that the claim you made was that you had been doing business in the past and therefore claimed the right to still do business?

A. I don't know as to that. The affidavit would show.

(Witness excused.)

LOUIS M. DILLMAN, of lawful age, called as a witness on behalf of the defendant, being first duly sworn, testified as follows.

Direct-examination.

Questions by Mr. HISTED:

Q. State your connection with the American Book Company.

A. I am one of the directors of the company, and assistant managing director of the Chicago office.

80 Q. State whether your corporation, in entering into this contract with the State text book commission, had any purpose or disposition to evade any of the corporation laws of the State of Kansas?

Mr. QUINTON: We object to that as incompetent, irrelevant and immaterial.

A. None whatever. On the contrary, we were very anxious to find out every requirement that they would make of us and were only too willing to comply with them to the best of our ability, once we found out what they desired.

Q. Did you as an officer of the corporation learn of the interpretation which had been placed upon the law and the duties of your company, as has been detailed by Mr. Smith?

A. Yes sir.

Q. State whether or not the company relied upon that interpretation?

A. We did, wholly so. It was our instruction to our attorney to find out any and all requirements that would be made of us, and then we would comply with them, and we were informed right along as to the procedure and we always had the caution to go to

the other extreme of covering everything so there would not be any possibility of any objections being made. We had reasons for that.

Q. Mr. Smith acted as attorney for the American Book Company, did he?

A. Yes sir.

Q. Acting upon the contracts of the commission, which have been set out here, state what, if anything, this defendant has done in the way of preparing for the performance of its contracts?

Mr. QUINTON: We object to that as incompetent, irrelevant and immaterial.

A. Upon the contracts being executed, as these books prepared for Kansas were largely special editions—that is, the commission had made certain requirements of us as to additions, etc., and changes in the books, which we complied with—it was necessary for us to make special editions; that is, the books we would sell in other States we could not sell here because of these changes the commission required in the text and which required a resetting, largely, of all of them, new plates being made and, of course, binding this edition particularly for this State. The time being short we went to work at once and got our plates ready and got everything ready so we might have the books all here when the schools should open. I should think, as near as my information goes—as that work is done at our general office in New York—I should think that half the process or more is fully completed now; the plates are all made. They are in process of printing now, which has been held up of course, being informed of this proceeding. Just making a rough estimate, I should think we have already gone to an expense of from twenty to fifty thousand dollars to comply with this contract—certainly twenty thousand dollars would be the minimum; I would put it nearly fifty thousand dollars. I don't know but what I would put it at more than that. Of course, it is just an estimate.

81

Q. Are these books available for other purposes or other States?

A. They are not, for the reasons I have stated. The commission appointed a committee, after they adopted these books, to make suggestions as to certain changes, so therefore the books we would sell here we could not put into our general trade, because they would be a different edition. No, it would be a total loss to us.

Q. Prior to the act of 1898, Mr. Dillman, did the company have any contracts with municipalities in Kansas?

A. Oh, yes, probably——

Chief Justice DOSTER: That is conceded, as I understand.

Mr. QUINTON: Yes sir.

Q. Are those still in force?—or is that conceded, too?

Chief Justice DOSTER: It is proper to state if you have them they are not affected.

82 Cross-examination.

Questions by Mr. QUINTON:

Q. This is the first report filed, in May 1902, that has ever been filed by the company in this State, is it not?

A. I don't know what that is.

Q. It is the report you filed.

A. I don't know what you have in your hand.

Q. You say when you made a bid for those contracts, you were very anxious to do everything the law compelled you to do, and you filed a report of your business that the law requires. Is that correct?

A. Yes, we did file a report.

Q. That is the first one you ever filed?

A. Yes, so far as I can remember or so far as I know.

Q. You say your attorney instructed you or advised you to go to the other extreme so as to comply with the laws of Kansas in 1902, at this time?

A. Yes.

Q. In making out that report, why did you leave out the requirements of the law as to the residences and names and number of shares of stock of your stockholders?

A. I don't know but what they are in. I haven't seen that report.

Q. You never filed a power of attorney, irrevocable, under this law of 1898, until 1902, did you?

A. I think not.

Q. You never complied with it in any respect until 1902?

A. No, I think not.

Q. You were right along through these four years and have been for the last ten years doing business in the State, and right along making contracts?

A. No, we haven't been doing that right along.

Q. You have been doing that some of the time?

A. Because the last five years there has been a contract covering the text books in Kansas.

Q. Haven't you been doing business as you have sworn in
83 that affidavit during this time?

A. Oh, yes.

Q. Haven't you made contracts?

A. With whom?

Q. It doesn't make any difference whom—in the State of Kansas since 1898.

Mr. HISTED: That is not in issue.

Chief Justice DOSTER: Suppose it has made contracts—what then?

Mr. QUINTON: That's all; I just wanted to show they were doing business.

The WITNESS: I thought I stated fully——

Chief Justice DOSTER: Never mind; the question is withdrawn.

Mr. HISTED: I offer to show by this witness that the character of the business of this defendant, at the time this suit was brought and now and ever since the Bush act was passed, was solely that of interstate commerce.

Mr. QUINTON: We object to that as not proper under the rulings.

Mr. Chief Justice DOSTER: Your pleadings set that up. The court ruled on that before, and refused to allow you to show that, and we still hold to that ruling.

Mr. HISTED: To which ruling the defendant excepts.

Mr. HISTED: I now offer in evidence a certified copy of the resolution of the board of directors authorizing service upon the secretary of state, the resolution being dated April 30, 1902.

Said document is in words and figures as follows, to-wit:

"STATE OF KANSAS:

OFFICE OF THE SECRETARY OF STATE.

I, George A. Clark, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the resolution of the board of directors of the American Book Company, authorizing the written consent thereof to be sued in the State of Kansas in accordance with the laws of such State, filed in this office for record on the 5th day of May, A. D. 1902.

84 In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, this 2nd day of June, 1902.

GEO. A. CLARK,
Secretary of State.

[SEAL.]

Resolution by the American Book Company of New Jersey.

30TH APRIL, 1902.

At a meeting of the directors of the American Book Company, duly held at the office of said company, on the 30th day of April, 1902, Mr. —— —— offered the following resolution, and moved its adoption:

Resolved, That the president and secretary of this company be and they are hereby authorized and instructed to execute the written consent thereof to be sued in the State of Kansas, in the manner provided in section 3 of an act of the legislature of the State of Kansas, concerning private corporations, approved January 7, 1899.

The resolution was adopted.

STATE OF NEW YORK, } ss:
County of New York, }

Gilman H. Tucker, being duly sworn, says he is secretary of the American Book Company of New Jersey, and that the foregoing is a true and correct copy of a resolution adopted by the board of direct-

ors of said American Book Company, on the 30th day of April, 1902, together with the minutes concerning said resolution.

GILMAN H. TUCKER, *Secretary.*

Sworn to and subscribed before me this 30th day of April, 1902.

W. L. BILLMYER,

[SEAL.] *Notary Public, Kings Co.*

My commission expires March 30, 1904. Cert. filed in N. Y. Co., No. 75."

85 Mr. HISTED: I now offer in evidence certified copy of the power of attorney, dated the 30th day of April, 1902. Said document is in words and figures as follows, to-wit:

"STATE OF KANSAS:

OFFICE OF THE SECRETARY OF STATE.

I, Geo. A. Clark, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the written consent of the board of directors of the American Book Company that action against such corporation may be had by service of process on the secretary of state of the State of Kansas in the proper court of any county, filed in this office for record on the 5th day of May, A. D. 1902.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 2nd day of June, 1902.

GEO. A. CLARK,

[SEAL.] *Secretary of State.*

Know all men by these presents: That the American Book Company, a corporation organized under the laws of the State of New Jersey, and with its principal office at Jersey City, in said State, hereby consents, without power of revocation, that actions may be commenced against it, the said American Book Company, in the proper court of any county in the State of Kansas in which a cause of action against such corporation may arise, or may have heretofore arisen, or in which plaintiff may reside, by service of process on the secretary of state of the State of Kansas; and the said corporation stipulates and agrees that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or any other chief officer of said corporation.

In witness whereof, said corporation has caused these pres-
86 ents to be executed by its president and its secretary and authenticated by its corporate seal, at New York, in State of New York, this 30th day of April, A. D. 1902.

[SEAL.] H. T. AMBROSE, *President.*

Attest: GILMAN H. TUCKER, *Secretary.*"

Mr. HISTED: I now offer in evidence certified copy of the report filed by the defendant in the office of the secretary of state on the 31st day of May, 1902.

Said document is in words and figures as follows, to-wit:

"STATE OF KANSAS:

OFFICE OF THE SECRETARY OF STATE.

I, Geo. A. Clark, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the annual statement of "The American Book Company," filed in this office for record on the 31st day of May, A. D. 1902.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 2nd day of June, 1902.

GEO. A. CLARK,
Secretary of State.

[SEAL.]

Annual Statement of the American Book Company, Incorporated under Laws of State of New Jersey, Located at New York City, New York, for the Year Ending May 30, 1902.

87 Capital stock.

Authorized capital, $5,000,000. Par value per share, $100.00.
Paid-up capital, $5,000,000. Market value per share, $115 to $130.

Statement of the Condition of the Company June 30, 190–.

Resources:	Dollars.	Cts.
Bills receivable	70,000.	
Real estate		
Personal property	3,250,000	
Stocks, bonds, and other securities	250,000	
Merchandise	2,000,000	
Cash on hand	75,750	
Due from banks		
Accounts receivable	404,250	
Judgments		
Total	$6,050,000	

Liabilities:	Dollars.	Cts.
Capital paid up	5,000,000	
Surplus		
Undivided profits		
Bills payable		
Accounts payable	150,000	
Bonded indebtedness	900,000	
Encumbrances on real estate or plant		
Bills rediscounted		
Total	$6,050,000	

Trustees and Directors.

Name.	Address.
H. G. Ambrose	New York city
Alfred C. Barnes	New York city
Henry B. Barnes	New York city
88 H. H. Vail	New York city
Henry Ivison	New York city
A. H. Hinkle	Cincinnati
W. B. Thalheimer	Cincinnati
Chas. P. Batt	New York city
J. M. Greene	New York city
Gilman H. Tucker	New York city
Charles J. Barnes	Chicago
L. M. Dillman	Chicago

Officers of the Corporation.

President, H. T. Ambrose.
Vice-president, Alfred C. Ambrose.
Second-Vice-president: —— ——.
Treasurer, Charles P. Batt.
Secretary, Gilman H. Tucker.
Managing director, Chas. J. Barnes.

List of Stockholders

And number of shares of stock owned by each.

Name.	Address.	No. shares.
H. T. Ambrose	New York	4,000
Henry B. Barnes	"	4,000
Alfred C. Barnes	"	3,500
H. H. Vail	"	3,500
A. H. Hinkle	Cincinnati	3,000
Richard H. Barnes	New York	1,500
L. M. Dillman	Chicago	250
Chas. E. Lane	"	250
J. M. Greene	New York	350
Chas. P. Batt	"	200
Gilman H. Tucker	"	200
W. B. Thalheimer	Cincinnati	1,000
Edwin M. Barnes	New York	1,500

89 The other stockholders being too numerous to mention, but owning small holdings and located in various parts of the United States; none of whom, however, reside in Kansas.

STATE OF KANSAS, } ss:
Shawnee County, }

We, Chas. J. Barnes, managing director of the above-named corporation, do solemnly swear that the above is a full and complete statement of the condition of the capital stock of this corporation on the 30th day of May, 1902, and of the resources and liabilities thereof on that day, to the best of his knowledge and belief. Also, that the above is a partial list of the stockholders of this corporation, and shows the post-office address and the number of shares of stock of this corporation held by each, as well as a list of the trustees or directors thereof, and the officers elected and appointed for the ensuing year, and that such election was held on the 18th day of March, 1902, and was conducted in conformity with the by-laws of the corporation.

CHARLES J. BARNES,
Managing Director.

Subscribed and sworn to before me, this 31st day of May, 1902.

A. M. HARVEY,
[SEAL.] *Notary Public.*

My commission expires Sept. 12, 1905.
Fee for filing this report (one dollar) herewith enclosed."

Mr. QUINTON: We desire to object to the legal sufficiency of the report.

Mr. HISTED: Upon the question going to show the interpretation placed upon this law, I also offer a contract made by the text book commission with the American Book Company on the 22nd day of September, 1899, signed by Mr. Frank Nelson as chairman and Mr. W. J. Hurd as secretary.

90 Mr. QUINTON: We object to that as incompetent, irrelevant and immaterial.

Chief Justice DOSTER: We will have to look at that, too.

Said document is in words and figures as follows, to-wit:

"*Contract.*

This agreement, made and entered into this 22nd day of September, A. D. 1899, by and between American Book Company, of Chicago, Illinois, party of the first part, and the School Text Book Commission of the State of Kansas, party of the second part,

Witnesseth, that whereas, the said party of the first part has submitted to the party of the second part its proposition to supply certain Webster Dictionaries to the public schools of Kansas, which said proposition and the dictionaries therein mentioned have been by said commission approved at a special meeting thereof, on September 1, 1899;

Now, therefore, in consideration of such approval of said proposi-

tion and of the dictionaries therein named, the said party of the first part hereby agrees and covenants that it will furnish to the school district boards and board of education of cities of the first or second class within the State of Kansas, desiring to purchase any of the said dictionaries, named in the proposition submitted by American Book Company, and at the prices therein named.

And the said American Book Company hereby covenants and agrees that it will in all things comply with and perform this contract in accordance with the terms and provisions of chapter 176 of the Laws of the State of Kansas passed in 1899, and all of the conditions and stipulations of every kind and character named, specified or stipulated in said chapter shall become and constitute a part and parcel of this agreement as fully and to the same extent as though each condition, specification or stipulation was set forth in full in the body hereof.

91 The State of Kansas is not to be held liable to said American Book Company for any sum of money whatever, but said American Book Company is to secure its pay and compensation solely and exclusively from the proceeds of the sale of said books.

Said party of the second part, as well as the parties of the first part, hereby agree to all of the terms, conditions and stipulations of the above and foregoing agreements.

In witness whereof, the parties hereunto have set their hands and seals this 22 day of September, A. D. 1899.

AMERICAN BOOK COMPANY.
CHAS. J. BARNES,
Managing Director at Chicago.
FRANK NELSON,
Chairman Text-book Commission.
W. J. HURD,
Secretary Text-book Commission."

Mr. HISTED: I also offer the bond in that connection.

Said bond is in words and figures as follows, to-wit:

"*Bond.*

"Know all men by these presents: That we, The American Book Company, of Chicago, Illinois, as principal, and Albert Sarbach and Max Sarbach, as sureties, are held and firmly bound unto the State of Kansas in the penal sum of one thousand dollars ($1000.00), for the payment of which sum well and truly to be made, we bind ourselves, jointly and severally, together with our assigns, administrators and heirs.

The condition of the foregoing obligation is such that whereas, on the 1st day of September, A. D. 1899, the proposition of said American Book Company, to furnish certain Webster School
92 Dictionaries to the school district boards and boards of education of cities of the first and second class of the State of Kansas, was approved by the School Text Book Commission of the State of Kansas, and in pursuance of such approval and the approval

of the said dictionaries furnished and supplied by the said American Book Company, a contract has this day been entered into by and between the said American Book Company and the said School Text Book Commission, providing and fixing the maximum at and for which said Webster Dictionaries may be sold, and by the terms of which the said American Book Company has agreed to furnish such dictionaries to school district boards and board- of education desiring to purchase the same, in accordance with the provisions of law and of the said proposition;

Now, therefore, if the said American Book Company shall well, truly and faithfully perform the conditions and agreements of said contract, and shall furnish said dictionaries to all school district boards and boards of education of cities of the first and second class desiring to purchase the same, in accordance with the provisions of said proposition, and at prices not greater than those mentioned therein, then this obligation shall be null and void; otherwise to be of full force and effect.

Witness our hands this 22 day of Sept. 1899.

AMERICAN BOOK COMPANY.
CHAS. J. BROWN,
Managing Director at Chicago.
ALBERT SARBACH.
MAX SARBACH.

STATE OF KANSAS, }
Jackson County, } ss:

Albert Sarbach and Max Sarbach, of lawful age, being each for himself first duly sworn, deposes and says that he is one of the sureties on the foregoing obligation and that he is worth the sum of one thousand dollars ($1,000.00) over and above all debts, exemptions and liabilities, so help us God.

93

ALBERT SARBACH.
MAX SARBACH.

Subscribed and sworn to before me this 22 day of September, A. D. 1899.

[SEAL.]

MARY C. BECKWITH,
Notary Public.

My commission expires Feb. 14, 1903.

The above and foregoing bond approved by the executive council of the State of Kansas this 27 day of September, A. D. 1899.

W. E. STANLEY, *Governor.*
GEO. A. CLARK,
Secretary of State.
F. E. GRIMES,
Treasurer of State.
GEO. E. COLE,
Auditor of State.
A. A. GODARD,
Attorney General.
FRANK NELSON,
Sup. of Pub. Instruction."

Q. Mr. Dillman, did you go on and carry out this contract I have offered?
A. Oh, yes sir.
Q. In 1899?
A. Yes sir.
Q. Is it finished, or are you still carrying it out?
A. Yes sir, we are still carrying it out.

(Witness excused.)

Mr. HISTED: We have a plea of another suit pending, and I offer a transcript of the record of the district court of Shawnee county, Kansas, in connection with this case.

Mr. QUINTON: We object to that as incompetent, irrelevant, immaterial, and not proper under the issues.

94 Chief Justice DOSTER: We will receive it and look at it.

Mr. QUINTON: To which ruling we except.

Said document is in words and figures as follows, to-wit:

"In the District Court of Shawnee County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 21691.

Petition.

Comes now the plaintiff herein, by Galen Nichols, the county attorney of the county of Shawnee in the State of Kansas, and for his cause of action herein says:

First. That the American Book Company is a corporation incorporated under and by virtue of the laws of a State other than the State of Kansas. That said American Book Company is a corporation engaged in the business of publishing and selling school books, and has been illegally engaged in the business of selling its books in the State of Kansas for the past three years, during which time it has presented to the school board of the State its books for use in the schools of Kansas, and has sold to the boards of education and to the pupils of the State of Kansas certain of its books and publications, and has entered into contract for the furnishing of school books, for use in the State, all of which books were published outside of the State of Kansas and by the said American Book Company. And the said American Book Company appeared before the Kansas State text book commission on the 5th day of May, 1902, in the city of Topeka, with a bid, offering to furnish certain school books for use in the schools of Kansas for the ensuing five years,

95 and were seeking to do business in the State of Kansas as a foreign corporation, through said text book commission, and did secure from said text book commission an adoption of

certain of its books for use in the schools of Kansas; and is now seeking to have said text book commission sign a contract with said American Book Company giving to said company the right to furnish the books so adopted. That all of its said acts in the soliciting of business in the State of Kansas for the sale of school books in the State of Kansas, and in its bid before the said text book commission, a commission provided for by the laws of the State of Kansas, the said American Book Company was acting in said county in violation of chapter 23 of the Compiled Laws of the State of Kansas of 1901, and has unlawfully and willfully persisted in such violation of the plain provision of said laws in this, to-wit:

First. That the said American Book Company has failed and neglected to make an application to the charter board of the State of Kansas for authority to do business in the State of Kansas as a foreign corporation.

Second. Said American Book Company has wilfully neglected for more than three years and for all of the time which *which* was illegally doing business in the State of Kansas to comply with the provisions of the statute requiring said corporation to file in the office of the secretary of state within thirty days after the taking effect of said act, to-wit: January 11, 1899, as a condition precedent to doing business in the State of Kansas, its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this State, in which the cause of action arose.

Third. Said American Book Company has unlawfully and wilfully refused to file with the secretary of state a complete detailed statement of the condition of such corporation, as provided by said law, by reason of which said failure to file said statement by the said American Book Company, whatever right or authority
96 it had to do business in this State by reason of its claim, that it was doing business in this State at the time said corporation law took effect, all of defendant's rights, under and by virtue of the provisions of said law, have been forfeited and the said unlawful acts aforesaid and the unlawful continuance of the defendant to do business in the said State of Kansas have caused and are causing great injury to the plaintiff and to the public.

Whereupon the plaintiff prays judgment against the said defendant that all the rights and privileges of whatever kind the said defendant claims be declared forfeited and the said defendant be forever enjoined from doing business in the State of Kansas, and that the defendant be adjudged to pay the costs of this proceeding.

GALEN NICHOLS,
County Attorney of Shawnee Co., Kansas.

The clerk will please issue summons in the above entitled cause, directed to Geo. A. Clark, secretary of state, commanding him to summon the defendant American Book Co. to appear and answer in said case.

GALEN NICHOLS,
County Attorney, for Plaintiff.

Restraining order granted.
Filed this May 31st, 1902.

A. M. CALLAHAM,
Clerk District Court, Shawnee Co., Kansas.

In the District Court of Shawnee County, State of Kansas.

STATE OF KANSAS, Plaintiff,
vs.
AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 21691.

George W. Crane, being sworn according to law, says: That he is acquainted with the facts herein, and that there was this day filed a petition in the district court of Shawnee county against the defendant, a corporation, organized in a State other than the
97 State of Kansas, charging it with attempting to do business in the State of Kansas contrary to the provisions of the laws of said State; that said defendant is seeking to enter into a contract with the Kansas State school text book commission for the purpose of furnishing school books for use in the schools of the State of Kansas, which said contract would be in violation of chapter 23 of the General Statutes of 1901.

The said defendant book company having failed to comply with the provisions of said law by either making an application to the charter board of the State of Kansas as a foreign corporation, or by filing its annual statement as provided by law for those foreign corporations doing business in the State at the time of the taking effect of said act, and for having failed to comply with any of the provisions of said act relating to foreign corporations; that the signing of said contract with the school text book commission during this litigation would produce injury to the plaintiff and the public, and that such act would be in violation of the plaintiff's rights respecting the subject of this action and would tend to render the judgment ineffectual, he therefore asked that an injunction be granted restraining said defendant from entering into any contract with the Kansas school text book commission or with any other persons, and from the transaction of any business of any kind in the State of Kansas; and that on a final hearing of said application the said injunction may be made perpetual and the said defendant forever enjoined from doing business in the State of Kansas.

GEORGE W. CRANE.

Subscribed and sworn to before me this 29th day of May, 1901.

W. E. FAGAN,
Probate Judge.

Filed this 31st day of June, 1902.

98 UNITED STATES OF AMERICA.

STATE OF KANSAS, } ss:
Shawnee County, }

The State of Kansas to George A. Clark, secretary of state, Greeting:

You are hereby commanded to notify the American Book Company, a corporation, that it has been sued by the State of Kansas in the district court within and for the county of Shawnee, in the third judicial district of the State of Kansas, and that unless it answer by the 14 day of July, 1902, the petition of the said plaintiff against it filed in the clerk's office of the court aforesaid, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 12" day of June, A. D. 1902.

Witness my hand and the seal of said court, affixed at my office, in the city of Topeka, this 2 day of June, A. D. 1902.

A. M. CALLAHAM, *Clerk,*
[SEAL.] By I. S. CURTIS, *Deputy.*

STATE OF KANSAS, } ss:
Shawnee County, }

Received this summons this 2nd day of June, 1902, and executed the same by serving the following within named defendant at the time following and in the manner following, to-wit: By registered mail, addressed to Gilmore H. Tucker, secretary of the defendant corporation, at New York city, New York.

[SEAL.] GEO. A. CLARK,
Secretary of State,
By HILL P. WILCOX,
Assistant Secretary of State.

Be it remembered that on this 2nd day of June, 1902, in the Shawnee county district court, third judicial district, State of Kansas, it being at the regular April 1902 term of said court, before the Hon. Z. T. Hazen, presiding judge, at which time the following proceedings among others were had, to-wit:

99 STATE OF KANSAS, Plaintiff,
vs.
AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 21691.

Now on this 2nd day of June, 1902, the application for temporary injunction, heretofore filed in this case, came on for hearing before the court, and is by the court denied and excepted to, and the restraining order heretofore granted is set aside and excepted to.

Be it remembered that on this 31st day of May, 1902, in the Shawnee county district court, third judicial district, State of Kansas, it being at the regular April term 1902 of said court, before Hon. Z. T. Hazen, presiding judge, at which time the following proceedings among others were had, to-wit:

THE STATE OF KANSAS, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 21691.

Now on this 31st day of May, 1902, the sworn petition having been presented to the undersigned judge of the district court, asking for an injunction, and upon such sworn petition, the judge grants a restraining order and sets the application for a temporary injunction for Tuesday, June 3rd, 1902, at 9 o'clock a. m. at the court house, and in the mean time the defendant is restrained from entering into any contract such as plaintiff is seeking to enjoin by its petition.

100 STATE OF KANSAS, } ss:
Shawnee County, }

I, A. M. Callaham, clerk of the district court within and for the county and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause, as the same appears on file and of record in my office.

Witness my hand and the seal of said court, hereunto affixed at my office in the city of Topeka this 19 day of July, A. D. 1902.

[SEAL.] I. S. CURTIS, *Clerk.*

Thereupon the defendant rested its case.

Thereupon the plaintiff, to maintain the issues upon its
101 part, offered evidence as follows, to-wit:

Mr. QUINTON: Will it be admitted that those are all the papers of any character on file in the secretary of state's office?

Mr. HISTED: I think that is true.

Mr. QUINTON: We have recently had an affidavit made to that effect.

Chief Justice DOSTER: We have recently held that certificates or statements by public officers or keepers of records, stating facts negatively, are inadmissible.

Mr. HISTED: We concede this fact, that those are all the papers filed.

Mr. QUINTON: We offer, then, the secretary of state's certificate to that effect.

Said document is in words and figures as follows, to-wit:

"STATE OF KANSAS,
Executive Department,

OFFICE OF THE SECRETARY OF STATE.

I, Geo. A. Clark, secretary of state of the State of Kansas, do hereby certify that the resolution of the board of directors of the American Book Company, the annual statement of the American Book Company, the written consent to accept service of process on the secretary of state, and the affidavit of A. W. Clancy, agent of the American Book Company, are all the papers of record now on file in the office of the secretary of state relative to the right of the American Book Company to transact business in the State of Kansas.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 2nd day of June, A. D. 1902.

[SEAL.]

GEO. A. CLARK,
Secretary of State,
By HILL P. WILSON,
Assistant Secretary of State."

102 Thereupon the plaintiff rested its case.

Chief Justice DOSTER: We will give you the usual time for argument—one hour on a side. To our minds, however, there are really but few questions. One is whether the fact that the defendant company may have been misled by an erroneous interpretation of the law, assuming it to be erroneous, will help to control the decision in granting or refusing the writ; and the other is whether the filing of these papers at the time they were filed was a compliance with the statute; and third, whether under the record there is another suit pending. Proceed with the argument.

And thereupon counsel for the respective parties argued said cause, and the court took said cause under consideration.

And the above and foregoing is all the evidence offered and admitted, and offered and rejected upon the trial of the cause, with all objections, rulings and exceptions, motions and demurrers made upon said trial, and is in all respects a full, true and complete transcript of all proceedings had upon the trial of said cause.

103 And thereafter the court rendered its judgment, ousting said defendant, The American Book Company, from the exercise of its right to transact business as a corporation in the State of Kansas until its compliance with the statutes of said State of Kansas; and the said American Book Company, defendant, then and there duly excepted and still excepts to said judgment, and it prays that this its bill of exceptions be allowed and signed at this the same term of court at which said trial was had, and that the same may be filed and made a part of the record herein; which is accordingly done.

Witness my hand as chief justice of the said court and for the court, on this 6th day of August, at the July term of said court for said year 1902.

FRANK DOSTER,
Chief Justice.

(Endorsed:) Filed Aug. 6", 1902. D. A. Valentine clerk supreme court. 13194 State *ex. rel. vs.* American Book Co. Bill of exceptions.

104 And afterwards, and on the same day, to-wit, the 6th day of August 1902 the plaintiff in the above entitled action filed its application for an order of injunction which said application is in words and figures following, to-wit:

105 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. —.

STATE OF KANSAS, }
Shawnee County. }

Application.

Galen Nichols being sworn according to law, deposes and says; that he is the attorney of Shawnee county and the attorney for plaintiff in the above entitled cause; that on the 4th day of August, 1902, the said defendant, The American Book Company, pretending to comply with the laws of this State, relating to foreign corporations, filed with the charter board of said State, an application for a certificate of authority to do business in the State of Kansas, and as a part of its said application, it filed a statement, purporting to be a statement showing its resources and liabilities in words and figures as follows, to wit:

Resources.		*Liabilities.*	
Bills receivable	$256898.94	Capital paid up	$5000000.00
Real estate	1820.71	Surplus	1223821.74
Personal property	5287557.11	Undivided profits	
Stocks, bonds & other securities		Bills payable	448500.00
Merchandise	1255380.31	Accounts payable	146541.86
Cash on hand	190357.97	Bonded indebtedness	800000.00
Due from banks		Encumbrance on real estate or plant	
Accounts receivable	626848.56		
Judgments			
Total	7618863.60		7618863.60

106 Which said statement affiant alleges is not in compliance with the law, requiring a detailed statement of its assets and liabilities; that from said statement, so filed, it is impossible to determine the solvency of said company; that said statement is all of said application filed by said company, showing the condition of its

assets and liabilities, and on the filing of said application, the said charter board issued to the defendant company a certificate of authority to do business over the objection of this affiant who filed a protest, copy of which is attached. But affiant says that the procuring of said certificate is not a compliance of said company with the order of this court; that it is not in compliance with the laws of the said State; and affiant believes and alleges the fact to be that the said defendant will, unless restrained by the order of this court, attempt to do business in the State of Kansas, and to carry out its contracts in violation of the order of ouster, rendered by this court, and its acts will be in violation of the plaintiff's rights, respecting the subject of this action, and will render the judgment ineffectual and a contempt of the orders of this court.

Wherefore, he asks that this court enjoin said defendant from attempting or in any wise, carrying out any of its contracts in this State or from exercising any rights claimed by its charter and he will ever pray. Further affiant says not.

I do solemnly swear the above statement is true, so help me God.

GALEN NICHOLS.

Subscribed and sworn to before me this 5th day of August, 1902.

M. F. LAYCOCK,
Notary Public.

My commission expires April 4, 1906.

[SEAL.]

107 STATE OF KANSAS:

OFFICE OF THE SECRETARY OF STATE.

I, Geo. A. Clark, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy in the matter of the application of "the American Book Company."

Objection to statement and request of Galen Nichols, county attorney for the State, filed on August 4th, 1902.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 4th day of August, A. D. 1902.

GEO. A. CLARK,
Secretary of State.

[SEAL.]

108 To the honorable charter board, State of Kansas:

In the matter of the application of the American Book Company for a charter, I respectfully submit that the statement filed by it is not in accordance with the laws of the State governing foreign corporations in this to-wit: The statement does not show a detailed statement of its assets and liabilities and I will ask that you require from them not only a detailed statement showing the items of their personal property, but also the items and dates of their bills receiv-

able, and of their accounts, and also to list any stock held by it in any other corporation, also that said company be required to produce its books of accounts for the past two years. I believe that in this way only can your board determine the solvency of said company, and whether it is in a condition to comply with the laws of the State. I believe that a full investigation of the affairs of this company is a duty this board owes to the State, and will result in hardship to none, but will save litigation and expense, and I ask for the information and statement on behalf of the State.

Respectfully, GALEN NICHOLS, *Co. Att'y.*

(Endorsed:) 13194. State *vs.* American Book Co. Application for order of injunction. Filed Aug. 6" 1902 D. A. Valentine, clerk supreme court.

109 Be it remembered, that on Wednesday, August 6th, the same being one of the regular judicial days of the July 1902 term of the supreme court of the State of Kansas, said court being in session at its court room in the city of Topeka, there being present, Honorable Frank Doster, chief justice Honorable W. A. Johnston and Honorable A. L. Greene, justices, the following proceeding was had and remains of record at page 193 of Journal " FF " in words and figures following:

THE STATE OF KANSAS *ex Rel.*, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } No. 13194.

Now come counsel for plaintiff and present their application for an order of this court to enjoin the defendant herein from attempting or in any wise carrying out any of its contracts in this State; or from exercising any rights claimed by its charter; and thereupon, after due consideration by the court it is ordered that said application for an order of injunction be denied.

110 And afterwards, and on the 11th day of August, 1902 the defendant in said action filed its petition and assignment of error which said petition and assignment of error is in words and figures, following, to-wit:

111 In the Supreme Court of the United States.

THE AMERICAN BOOK COMPANY, Plaintiff in Error,
vs.
THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Defendant in Error.

Comes now The American Book Company, plaintiff in error in the above-entitled cause, and says, that in the record and proceedings of the supreme court of the State of Kansas in said cause there

is manifest error, and said plaintiff in error makes the following assignment of errors:

I.

The supreme court of the State of Kansas erred in holding that paragraph three of the answer of the plaintiff in error did not constitute a defense and in sustaining the objection to the admission of any evidence in support thereof.

II.

The supreme court of the State of Kansas erred in holding that chapter 10 of the Laws of 1898, as amended by chapter 125 of the Laws of 1901, in so far as the same constitutes a regulation of foreign corporations engaged solely in the business of interstate commerce, is not violative of section 8 of article 1 of the Constitution of the United States, and in denying the protection of said Constitution invoked by the defendant upon said trial.

III.

The supreme court of the State of Kansas erred in holding that the fact that the business of the defendant was solely inter-state commerce constituted no defense to the plaintiff's petition, and in refusing to allow evidence in support of such defense, and in entering judgment of ouster against the defendant, enjoining and prohibiting it from engaging in inter-state commerce within the State of Kansas.

112

IV.

The supreme court of the State of Kansas erred in holding that the provisions of the act of 1898, as amended by chapter 125 of the Laws of 1901, in so far as they require foreign corporations engaged solely in the business of interstate commerce to file copies of their charters and pay the charter fees therein provided, do not constitute a regulation and restriction upon interstate commerce within the prohibition of the Constitution of the United States.

V.

The supreme court of the State of Kansas erred in holding that the terms of said act of the legislature of the State of Kansas, in so far as they apply in any respect to foreign corporations, whose business in the State of Kansas is solely that of interstate commerce, are not in violation of section 8 of chapter 1 of the Constitution of the United States.

VI.

The supreme court of the State of Kansas erred in rendering a judgment of ouster in said cause against this defendant.

VII.

The supreme court of the State of Kansas erred by its judgment o ouster denying to this defendant the right to perform contracts made by this defendant for the sale of certain school books and supplies in Kansas, prior to the passage of the act of 1898, and in excluding said defendant absolutely from the State of Kansas, thereby so construing the said act of 1898, as amended by the act of 1901, as to render it violative of section 10 of article 1 of the Constitution of the United States in that it impaired the obligations of said defendant's contracts.

113 VIII.

The supreme court of the State of Kansas erred in denying the protection claimed by said defendant under section 10 of article 1 of the Constitution of the United States, against the law of 1898, as amended by the law of 1901, in so far as it attempted to impair the obligation of contracts of said defendant made prior to the passage of said law.

Wherefore, your petitioner respectfully prays that a writ of error may be issued out of this court, directed to the supreme court of the State of Kansas, commanding said court to serve and send to this court a full and complete transcript of the records and all proceedings of said supreme court of the State of Kansas in said case wherein The State of Kansas *ex rel.* Galen Nichols, county attorney of Shawnee county is plaintiff, and The American Book Company is defendant, and that your petitioner may have such other and further relief and remedy in the premises as to this court may seem appropriate, and that said judgment of said supreme court of the State of Kansas in said case and every part thereof may be reversed by this honorable court.

And your petitioner will ever pray.

THE AMERICAN BOOK COMPANY,
By ROSSINGTON, SMITH AND HISTED,
F. DUMONT SMITH, AND
A. M. HARVEY, *Its Att'ys.*

(Endorsed :) 13,194. U. S. Supreme Court The American Book Co. *vs.* The State of Kansas *ex rel.*, Galen Nichols, Co. att'y of Shawnee county. Petition and assignment of errors. Filed Aug. 11th, 1902. D. A. Valentine, clerk supreme court. Rossington, Smith & Dallas, attorneys for pl'ff in error.

114 And thereupon, and on the said 11th day of August 1902 before Honorable Frank Doster, chief justice of the supreme court of the State of Kansas at his chambers in the city of Topeka the following proceeding was had and remains of record at page — of Journal FF in words and figures following, to-wit:

STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant. } No. 13194.

Upon consideration of the petition of The American Book Company, the defendant in the above entitled cause, the court does allow the writ of error prayed for therein, upon The American Book Company giving a bond according to law in the sum of five hundred dollars ($500.00).

115 And on the same day, to-wit, the 11th day of August, 1902 said defendant filed its supersedeas bond as required by the foregoing order allowing the writ of error and said bond is in words and figures following, to wit:

116–120 In the Supreme Court of the State of Kansas.

STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, Defendant.

Know all men by these presents, that we, The American Book Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, as principal, and The American Bonding Company of Baltimore, as surety, are held and firmly bound unto the State of Kansas in the sum of five hundred dollars, to which payment well and truly to be made we bind ourselves, jointly and severally, and all and each of our heirs, successors and executors and administrators, firmly by these presents.

Sealed with our seal this eighth day of August, 1902.

Whereas, the above named The American Book Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas,

Now, therefore, the condition of this obligation is such that if the above named The American Book Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

[SEAL.] THE AMERICAN BOOK COMPANY,
By CHAS. BLOOD SMITH, *Its Att'y.*

Attest: FRANK H. FOSTER, *Ass't Sec'y.*

AMERICAN BONDING COMPANY
OF BALTIMORE,
By J. W. THURSTON, *Vice President.*

Approved:
FRANK DOSTER,
Chief Justice of the Supreme Court
of the State of Kansas.

(Endorsed:) 13194. Bond for appeal. Filed Aug. 11 1902. D. A. Valentine clerk supreme court.

121 The United States of America to the State of Kansas *ex rel.* Galen Nichols, county attorney of Shawnee county:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The American Book Company is plaintiff in error, and The State of Kansas on the relation of Galen Nichols, county attorney of Shawnee county, is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas this 11 day of August, 1902.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

I accept service of the above this 11th day of August 1902.

GALEN NICHOLS,
Co. Att'y and Att'y for Pl'ff.

(Endorsed:) No. 13194. Citation.

122 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS *ex Rel.* GALEN NICHOLS, County Attorney Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 13194.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the record in the above entitled cause in said supreme court of Kansas.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas hereto affixed at my office in the city of Topeka, this 19th day of August, A. D. 1902.

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

123 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the Relation of GALEN NICHOLS, County Attorney of Shawnee County, Plaintiff,
vs.
THE AMERICAN BOOK COMPANY, a Corporation, Defendant. } No. 13194.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas on the 11th day of August, 1902, and directed to the supreme court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record, and all proceedings of this court, in the within entitled cause, with all things concerning the same, to-gether with the original writ of error and citation with acceptance of service thereof, hereto attached.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of Kansas hereto affixed at my office in Topeka this 19th day of August, A. D. 1902.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

124 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of Kansas, before you, being the highest court of law and equity in said State, in which a decision could be had in said suit between The State of Kansas, *ex rel.* Galen Nichols, county attorney of Shawnee county, plaintiff, and The American Book Company, defendant, wherein a right, privilege and immunity were and are claimed under the Constitution and statutes of the United States, and the decision was against the right, privilege and immunity claimed thereunder, a manifest error hath happened to the great damage of said The American Book Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at Washington on or before the 10th day of September, 1902, next, in said Supreme Court, to be then and there held, to the end that the

record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of August,
125 in the year of our Lord one thousand, nine hundred two.

Issued at office in the city of Topeka with the seal of the circuit court of the United States for the first division of the judicial district of Kansas, dated as aforesaid.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed:

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] 13194. Writ of error. Filed Aug. 11, 1902. D. A. Valentine, clerk supreme court.

126 The United States of America to the State of Kansas *ex rel.* Galen Nichols, county attorney of Shawnee county:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The American Book Company is plaintiff in error, and The State of Kansas on the relation of Galen Nichols, county attorney of Shawnee county, is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas this 11 day of August, 1902.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

I accept service of the above this 11th day of August 1902.

GALEN NICHOLS,
Co. Att'y and Att'y for Pl'ff.

[Endorsed:] 13194 Citation. Filed Aug. 11, 1902. D. A. Valentine, clerk supreme court.

Endorsed on cover: File No. 18658. Kansas supreme court. Term No. 126. The American Book Company, plaintiff in error, *vs.* The State of Kansas *ex rel.* Galen Nichols, county attorney of Shawnee county. Filed September 2, 1902.

FILE COPY. 1139

Office Supreme Court U. S.
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Clerk.

In the Supreme Court

OF THE

United States.

The American Book Company,
Plaintiff in Error,
vs.
The State of Kansas, ex relatione Galen Nichols, County Attorney of Shawnee County, Kansas,
Defendant in Error.

October Term, 1903. No. 126.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR ON MERITS AND ON MOTION TO DISMISS.

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Attorneys for Plaintiff in Error.

The Hall Litho. Co., Printers and Binders, Topeka. 2980

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October Term, 1903. No. 126.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error prosecuted to review a judgment of ouster pronounced by the Supreme Court of the State of Kansas against the American Book Company. The suit was one instituted in the Supreme Court of the State in the nature of *quo warranto* by the State upon the relation of Galen Nichols, County Attorney of Shawnee

County, to oust the American Book Company from transacting business in Kansas upon the ground of its failure to comply with a certain Act of the Legislature of the State of Kansas, commonly called the Bush Corporation Act.

Under the statutes of Kansas the writ of *quo warranto* and proceedings by information in the nature of *quo warranto* are abolished and the remedies heretofore obtainable in those forms may be had by civil action. (See section 5148 of the General Statutes of 1901.)

So much of the Bush Corporation Act as is appurtenant to this controversy is printed as an appendix to this brief, namely, sections 1259, 1260, 1261, 1262, 1263, 1264 and 1283 of the General Statutes of 1901.

The American Book Company was charged with having violated the statute in three particulars, as follows: First, in failing to make application to the charter board for authority to transact business as a foreign corporation and paying the fees prescribed; second, in failing to file with the Secretary of State its written consent irrevocable that actions might be commenced against it in any county in the State in which a cause of action should arise or in which the plaintiff should reside.

by service of process upon the Secretary of State; third, in failing to file the annual report provided by section 1283.

The petition in this case was filed in the Supreme Court on June 7, 1902. Summons was issued and served, under which the defendant had until July 18 within which to plead. On July 11, upon an *ex parte* application of the attorneys for the State and without notice to the defendant, one of the justices granted a temporary injunction, so-called, which appears at page 7 of the Record. This injunction was forthwith served upon the defendant. It will be observed that it was to all practical intents and purposes a final judgment in the case, in the respect that it forbade the defendant transacting any business in the State pending the hearing of the cause, and practically accomplished an expulsion of the defendant from the State in advance of trial, and even in advance of an opportunity to plead to the petition.

The defendant thereupon filed a motion to set aside this injunction, which is set forth at page 8, *et seq.*, of the Record. This was presented for hearing in chambers before four of the Justices. The Justices, however, refrained from passing upon the motion to vacate the injunction, but ruled

the defendant to answer to the merits by the 18th of July and set the case down for final hearing on its merits on the following Monday, the 21st. Within the time limited the defendant filed an answer, which is set forth at length on page 16, *et seq.*, of the Record. In its answer the defendant expressly invoked the protection of the Constitution of the United States and raised various Federal questions appurtenant thereto in this, to wit:

First, that the business of the defendant within the State of Kansas was solely that of interstate commerce, and the Act of the Legislature of the State of Kansas could have no lawful application to such business, and the Court was without power to exclude the defendant from the transaction of the business of interstate commerce within the State of Kansas.

Second, it was alleged that the defendant had, prior to the passage of the Bush Corporation Act of 1898, entered into contracts with certain persons and corporations in the State of Kansas for the sale and delivery of the commodities published and manufactured by defendant, which said contracts were still in full force and effect, and under which the defendant had incurred liability, and it was thereupon charged that if said Act be con-

strued as applicable to the defendant and to authorize the Court to grant the judgment of ouster and to thereby preclude the defendant from performing its contracts so as aforesaid made, the Act was in further violation of section 10 of article 1 of the Constitution as being a law impairing the obligation of a contract.

When it came to the trial it was conceded that the business of the defendant was solely that of interstate commerce, and by reason of this admission the Court declined to permit proof. The Court, however, held that the terms of the Act applied as fully to corporations engaged solely in interstate commerce as to those engaged in any other character of business; that the Act was a legitimate exercise of the power of the State, and consequently the defense was not well taken.

Upon the second Federal protection invoked, the existence of the facts averred in the answer was conceded upon the trial. The Court, whilst announcing that it would bear this condition in mind and reserve to the defendant in any adverse judgment which it might pronounce the right to continue in the performance of such contracts, when it came to enter judgment, ignored this situation and pronounced an absolute judgment of

ouster without reservation or qualification. Other defenses to the proceeding were interposed and raised upon the hearing, but as they are not of a Federal character it is not necessary to notice them here. Suffice to say that the Court held against the defendant upon all of the contentions which it urged and entered the judgment to review which this writ of error is prosecuted.

Specification of Errors.

I.

The court erred in holding that the provisions of the Act of 1898, as amended by chapter 125 of the Laws of 1901, in so far as they apply to foreign corporations, engaged solely in the business of interstate commerce, do not constitute a regulation and restriction upon interstate commerce within the prohibition of section 8 of article 1 of the Constitution of the United States, and are therefore void.

(This is set forth in Assignment of Errors 1, 2, 3, 4 and 5.)

II.

The Supreme Court of the State of Kansas erred in its judgment of ouster in denying to this plaintiff in error the right to perform contracts made by this defendant prior to the passage of the

Act of 1898 and in excluding said plaintiff in error absolutely from the State of Kansas, thereby so construing the Act of 1898, as amended by the Act of 1901, as to render it violative of section 10 of article 1 of the Constitution of the United States, in that it impaired the obligations of said defendant's contracts.

III.

The Supreme Court of the State of Kansas erred in its judgment of ouster in denying to this plaintiff in error the right to enforce through the courts of the State a contract made prior to the passage of the Act of 1898, thereby denying to the plaintiff in error the equal protection of the laws and depriving it of its property without due process of law, as guaranteed to plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

IV.

The Court erred in pronouncing a judgment of ouster in said cause against the plaintiff in error.

ARGUMENT.

The Bush Corporation Act Void in so far as it Attempts to Regulate Corporations Engaged Solely in Interstate Commerce.

As will be seen by an examination of the statutes appended to our brief, no attempt is made to classify foreign corporations engaged in business in Kansas in respect to the nature of such business. There was no question in the case in regard to the character of the business conducted by plaintiff in error in Kansas. Paragraph three of the answer sets out with some degree of detail the facts. It appears that the only business transacted by the American Book Company in the State of Kansas was that of selling school text books, reference books and other publications to dealers and merchants in the State of Kansas. It is averred in this paragraph of the answer:

"That this defendant is the owner of certain copyrights and prepares and manufactures its own books and publications. That for such purposes this defendant owns and operates, in Cincinnati, Ohio; Chicago, Illinois, and New York City, certain factories and binderies, wherein the type for its publications is set and the same are completely printed, bound and prepared for sale and transportation to customers. That this defendant does not now, and did not at the time of the bringing

of this suit, own any property connected with the manufacture and sale of said business within the State of Kansas, nor any other property whatsoever, within the said State. That this defendant has been, and is now, engaged in selling its said publications to dealers and merchants located at various points in the State of Kansas and other States of the United States, and in making such sales packs and ships its said publications over appropriate railroads, consigned to the persons to whom they are sold, and delivers them to the consignees in the original packages in which they were packed for shipment. That with reference to the State of Kansas all sales of such merchandise made by this defendant are of goods manufactured and shipped from points in other States to points within the State of Kansas and there delivered in the original packages to such purchasers."

The following extracts from the bill of exceptions sufficiently indicate the view which the Court took of this defense (p. 38):

"Chief Justice Doster: Let me say this, gentlemen, that so far as one question that the defense in this case wishes to raise is concerned, the court is ready to pass on it and it may be passed on for the purpose of shortening the work of the case. Whether this corporation is engaged in interstate commerce or not, or, rather, assuming it to be engaged in what is called interstate commerce business, we shall hold that it is subject to reasonable legislation and regulation. That is the law. That is the decision of the Federal courts. While a corporation is engaged in interstate commerce and may not be excluded wholly from the State—must be allowed to do business in the State—that is, interstate business—yet all the holdings are that it is subject to reasonable regulation.

Mr. Histed: Your honor's suggestions leave me in some doubt as to the course of procedure, whether or not the court decides at this time that the answer as pleaded in paragraph 3 constitutes no defense. I take it that is what the court has decided, and that no evidence will be permitted on that point.

Chief Justice: If you mean by that to interpose the objection that you are engaged in interstate trade and therefore are not subject to regulations of this Bush Act, then you are correct—it is no defense.

Mr. Histed: The requirements of the Bush Act are various, as applied even to foreign corporations, and of course, with the general statement which your honor makes of the view of the law, it may or may not be applicable to this defense.

Chief Justice Doster: The State in this case makes three claims. One is that you are required to apply for permission to do business, refiling your New Jersey charter or something like that, and on doing that you could obtain a permit to transact business here. Another is that you were required to file reports of your business; and another is that you were required to file an irrevocable power of attorney, appointing some person upon whom service can be made; and that you did not do any one of those things, and for that reason that you should be ousted.

Mr. Histed: There is also the other requirement which I suppose your honor included within the first; that is, that we shall pay a certain fee, conditioned on the amount of the charter. I suppose the court also holds that this is incumbent upon the company.

Chief Justice Doster: We had not heard that matter discussed.

. . . . . .

Mr. Histed: To get this question so we will

understand it, do I understand the court would sustain an objection to any evidence offered under paragraph 3 of this answer?

Chief Justice Doster: Yes, sir.

Mr. Histed: To which ruling of the court the defendant objects and excepts, because the business of the defendant is within the protection of section 8 of article 1 of the Constitution of the United States, as pleaded."

Again, on page 49, while the assistant managing director of plaintiff in error was upon the stand, the following occurred:

"I offer to show by this witness that the character of the business of this defendant, at the time this suit was brought, and now and ever since the Bush Act was passed, was solely that of interstate commerce.

Mr. Quinton: We object to that as not proper under the rulings.

Mr. Chief Justice Doster: Your pleadings set that up. The court ruled on that before and refused to allow you to show that, and we still hold to that ruling.

Mr. Histed: To which ruling the defendant excepts."

The judgment as pronounced by the Court was:

"That the defendant, The American Book Company, be ousted from the exercise of the right to transact business as a corporation in the State of Kansas until its compliance with the statutes of this State providing for the making of an application to the Charter Board of the State to do such business, and the filing of a certified copy of its charter or articles of incorporation, and a statement of the matters and things required by section 2 of chapter 10 of the Special Laws of 1898, and

the payment of the fees required by law. (Page 31 of the Record.)

Under the interpretation placed by the Supreme Court upon this statute, as well as upon the facts in this case, it therefore must be accepted that the regulations and requirements provided by the Bush Corporation Act apply to the same extent to corporations engaged solely in the business of interstate commerce as to those engaged in any other class of business. The construction placed by the Supreme Court of Kansas is, of course, binding upon this Court.

New York State v. Roberts, 171 U. S. 661.

The single question presented is whether thus construed this legislation is a valid and permissible State regulation of corporations engaged in that business, or whether on the other hand it transcends the power of the State and is in violation of section 8 of article 1 of the Constitution of the United States.

It will be observed in the first instance that a charter board is created to which a corporation must apply for authority to engage in business in the State. Its ability to transact business in the State thereafter is not a matter of right founded upon the Federal Constitution, but is dependent upon the permission of this charter board. The corporation must present, first, a certified copy of its

charter or articles of incorporation; second, an application which shall set forth the place where its principal office or place of business is to be located; third, the full nature and character of the business in which it proposes to engage; fourth, the names and addresses of the officers, trustees or directors, and stockholders of the corporation; fifth, a detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine its solvency. The application must be accompanied by a fee of twenty-five dollars, to be known as an application fee. And by the terms of sec. 1261, Gen. Stat. 1901 (sec. 3, ch. 10, Laws 1898):

"In all cases where such applications are made by corporations organized under the laws of any other state, territory or foreign country, and as a condition precedent to obtaining authority to transact business in this State, said corporation shall file in the office of the secretary of state its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this State in which the cause of action arose, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation," etc.

By section 5 of the Act of 1898, (Appendix,

1263), it is required that the charter board shall hold at least one meeting each month, and it then provides:

"The board shall make a careful investigation of each application and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted. [And in case of domestic corporation, charter shall be issued.] In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the solvency of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized in accordance with the laws of the state, territory or foreign country under which it is incorporated, that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be organized in this State, the application shall be granted and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted and that such foreign corporation may engage in business in this State as hereinafter provided."

Section 1 of chapter 125 of the Laws of 1901 (1264 Gen. Stat. 1901) provides for the payment of a charter fee by either foreign or domestic corporations, which is graduated upon the amount of its capital stock as follows: One-tenth of one per cent upon the first one hundred thousand dol-

lars; one-twentieth of one per cent upon the next four hundred thousand dollars, and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The capital stock of the American Book Company is $5,000,000, fully paid, which would require the payment of $1,300.00 fees as a condition precedent to its right to engage in business in the State.

To recapitulate the provisions of this statute: There is lodged in the charter board a wide and extended power, to be exercised in its discretion in the admission of foreign corporations. It is sought to vest in this board the right to determine the legality and validity of the charter issued to the corporation by a foreign State, and to that extent to exercise a power of supervision and revision over the acts of the duly constituted officers of such other State. Furthermore, no matter how legitimate may be the business which the foreign corporation is authorized to transact, if the statutes of Kansas have failed to provide for corporations for such business, the board is, impliedly at least, given the right to reject the application. The corporation is required to exhibit to the minutest degree of detail its entire financial affairs and must

make them a matter of public record in this State, and this will include among other things the names and addresses of the stockholders. It must submit itself to the jurisdiction of the State courts, and this requirement is in language so general that it cannot be said to be confined even to causes of action which originate in the State. Finally, it must pay into the treasury of the State the graduated license tax provided by section 1264. No distinction is made among the corporations in this respect, nor any right of discretion conferred upon the board to adjust or vary this license fee. The volume of business to be transacted or the length of time within which the corporation may be engaged in the business in the State is of no consequence.

After the corporation shall have received the permit it is then required to file annual statements, which shall set forth a great variety of information, among which are, first, the authorized capital stock; second, the paid-up capital stock; third, the par value and the market value per share of said stock; fourth, a complete and detailed statement of the assets and liabilities of the corporation; fifth, a full and complete list of the stockholders, with the postoffice address of

each, and the number of shares held and paid for by each; sixth, the names and postoffice addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. These reports must appear upon blanks to be prepared by the secretary of state and approved by the charter board, and must be accompanied by a further fee of one dollar. In addition, the secretary of state is authorized to require a further or supplementary report. As a penalty for the failure to file such reports by foreign corporations, the section provides:

"And such failure to file such statement by any corporation doing business in this State and not organized under the laws of this State, shall work a forfeiture of its right or authority to do business in this State, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper."

And as a further penalty in the same section:

"No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State, without first obtaining the certificate of the secretary of state that the statements provided for in this section have been properly made."

Declining to allow even an opportunity for ar-

gument upon the subject, the learned Chief Justice of the Supreme Court of Kansas declared that these were reasonable regulations which the State might lawfully impose upon corporations engaged solely in the business of interstate commerce, and said that he also expressed the view of his brethren of the court. With great deference to that learned tribunal, we submit that if an obvious conclusion without argument is to be gathered from this record, it is a conclusion exactly contrary to the one reached by that court. It is difficult to conceive a set of regulations which would impose greater hindrances and obstructions to interstate commerce than those evidenced by the Bush Corporation Act. If the construction of the Supreme Court of Kansas is to be upheld, the wholesaling corporation of Chicago cannot sell and deliver to its customer in Topeka, Kansas, a five-pound package of coffee until it receives the sanction of this charter board and pays the large fee exacted by it. The American Book Company, whose entire factory, warehouse and place of business are outside of the State of Kansas, cannot employ the avenues of trade or the highways of commerce within the State of Kansas without first submitting to similar requirements and exactions.

It cannot supply a local bookdealer with an arithmetic printed, bound and shipped from beyond the State until it shall have first paid into the treasury of the State thirteen hundred dollars and submitted itself to the jurisdiction of the court. Indeed, the case is more extreme even than the illustration given, because if for any reason, good, bad or indifferent, the charter board should determine that the capital of the company is impaired, or the corporation was not legally organized, it may, despite the tender of such fees and of performance of the other requirements of the Act, absolutely exclude the corporation from transacting business at all.

It seems to us that the case is squarely ruled by the decision of this Court in *Crutcher v. Kentucky*, 141 U. S. 47. The Act of the Legislature in that case prohibited the agent of any express company not incorporated by the laws of that State from setting up, establishing or carrying on the business of transportation in the State without first obtaining a license from the auditor of public accounts. By section 2 of that Act it was required that before the auditor should issue such license there should be filed in his office a copy of the charter of the company and a statement

made under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock and how paid, and of what the assets of the company consisted, the amount of losses due and unpaid by said company, and all other claims against the company due or not due; and must further show that the company is possessed of an actual capital of at least $150,000, either in cash or in safe investments, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it was made the duty of the auditor to issue a license upon the payment of a fee of $2.50.

We trust we may be pardoned for putting upon our brief the language of this Court, disposing of the contentions of the State in respect to this statute (p. 56):

"We regret that we are unable to concur with the learned Court of Appeals of Kentucky in its views on this subject. The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky, a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the

State law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the State Legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the National and not the State Legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State Legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on

their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

Again, on page 58, the Court said:

"As was said by Mr. Justice Lamar, in the case last cited [*Norfolk & Western R. R. v. Pennsylvania*, 136 U. S. 114, 118], 'It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.'

We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104; *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U. S. 114.

As a summation of the whole matter, it was aptly said by the present Chief Justice in *Lyng v. Michigan*, 135 U. S. 161, 166: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' "

In *Hooper v. California*, 155 U. S. 648, 652,

the distinction between the case of a foreign corporation engaged in interstate commerce and one whose business is purely local and the respective rights of the State to interfere and impose restrictions is pointed out.

Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 734, involved the construction of section 10 of article 15 of the constitution of Colorado, providing as follows:

"No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."

And also a statute enacted to carry the foregoing clause into effect. This Court said (p. 734):

"So it is clear the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the State for carrying on commerce between the States, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several States. The prohibition against doing any business cannot, therefore, be literally interpreted."

In *Pembina Consolidated, etc., Milling Co. v. Pennsylvania*, 125 U. S. 181, it was held:

"The exaction of a license fee by a State to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents, or employes of the corporation, does not impinge

upon the commercial clause of the Federal Constitution (Article I, section VIII, clause 3), provided the corporation is neither engaged in carrying on foreign or interstate commerce, nor employed by the Government of the United States."

It is true that in *Emert v. Missouri*, 156 U. S. 296, this Court upheld a statute of Missouri requiring all peddlers to take out a license. It was held to be within the police power of a State to regulate the occupation of itinerant peddlers, citing (on page 313) the following quotation from *Brown v. Maryland*, 12 Wheat. 443:

"The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way."

Commenting on the foregoing, Mr. Justice Peckham, in *Schollenberger v. Pennsylvania*, 171 U. S. 23, said:

"It was held to be within the police power of the State to regulate the occupation of itinerant peddlers and to compel them to obtain licenses to practice their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall in *Brown v. Maryland*, *supra*, was quoted, that 'the right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way.' It was the privilege of selling in a peculiar way, as a peddler, which was licensed in the Emert case, and such a person, it was therein decided,

could properly be made to pay a license for selling in that way an article manufactured in another State and sent into Missouri, as well as for selling in the same way articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.

The Emert case *does not overrule or affect* the cases above cited as to the right to sell."

This Court accordingly held that a statute of Pennsylvania prohibiting the sale of oleomargarine was void in so far as it attempted to apply to and exclude interstate importations and sales.

Applying this decision to the case at hand, there is sought to be vested in this charter board by the statutes of Kansas, as construed by its Supreme Court, a right of absolute exclusion from the State of the American Book Company, whose business is conceded by the Court to be solely interstate commerce. There is and can be no pretext of a rightful exercise of the police power such as was relied upon in the oleomargarine case. The commodity dealt in here, school and text books and other similar supplies, is manifestly a wholesome and useful one, necessary in fact to the welfare and advancement of the community. It is to be observed that there is no attempt throughout the entire text of this legislation toward regulation of products, or the exercise of any supervision or right of inspection of commodities

sold and delivered; nor, in fine, of any power referable to the police power of the State. The right of regulation asserted is of the corporation itself, and this in matters wholly apart from and foreign to any valid claim of police control.

In *Hopkins v. United States*, 171 U. S. 578, 597, Mr. Justice Peckham said:

"In all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility."

Here, as we have remarked, no claim even can be made that the charges and exactions imposed by the Act are for any local facility for the transaction of commerce. In no respect is the commerce conducted by the plaintiff in error aided or facilitated by anything which it must do under the requirements of this law. There is not annexed to the sales any privilege or immunity which did not already obtain. The case is one which falls clearly upon the side of those distinguished by the Court in the Hopkins case. The State seeks to meet the corporation upon its borders and abso-

lutely prohibit it from coming into the State with its product except upon the terms prescribed. It is not an attempt to direct or control the sale in any peculiar method, but is an absolute denial of the right to sell at all.

In *Leloup v. Port of Mobile*, 127 U. S. 640, 644, where an attempt had been made to require the Western Union Telegraph Company to pay a license tax, this Court said:

"In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county and port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do."

So here, the fee required under the provisions of section 1264 is purely a tax on the privilege of doing the business of the corporation. It is none the less liable in addition to pay taxes to the county and all subordinate municipalities upon any property which it may have there subject to taxation, at the same rate and to the same extent as other incorporations and individuals are required to do.

As in that case, so in this, there is put the ques-

tion propounded by the Court, which we quote, together with the answer given (p. 645):

"Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

In *Brennan v. Titusville*, 153 U. S. 289, it was decided that:

"An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent, sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States."

After a most interesting and instructive discussion of the law, Mr. Justice Brewer quoted the

language above set out from *Leloup v. Mobile*, and then added (p. 303):

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constition to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

Pullman Co. v. Adams, 189 U. S. 420, which is the most recent decision of this Court, illustrates the case at hand. The contention of the Pullman Company was that by section 195 of the State Constitution of Mississippi it was compelled to transport passengers from one point to another within the State and that consequently the tax as imposed upon sleeping car companies was in effect a burden upon its interstate commerce. This Court said (p. 421):

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was

held bad in *Crutcher v. Kentucky*, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne v. Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

It seems to us that the question presented by the case at bar is a simple and elemental one, which has been decided many times by this Court. There is no question here of the nature of the business, because the allegations of the defendant are conceded in the most ample terms by the lower court. Neither is there any room for the assertion of a police power for the preservation of the lives and health or morals of the community or to insure their well being in any respect. In simple terms the position of the State is the assertion of the unrestricted right to exact a license from a foreign corporation before it may be permitted to transact purely interstate commerce, and this not a nominal tax, but a large sum of money. Upon that question, of course, the decisions of this Court are final and ultimate authority.

It would be but an idle task to place upon the brief similar decisions of State courts, although one

quite in point is that of *Bateman v. Western Star Milling Company*, 1 Texas Civil Appeals, p. 90, 20 S. W. 931. Texas had a statute requiring all corporations desiring to transact business in the State to file with the secretary of state a duly certified copy of their articles of incorporation and to pay a fee ranging from twenty-five to two hundred dollars, according to the amount of their capital stock. The syllabus sufficiently elucidates the facts:

"A corporation domiciled in Kansas, through its commercial agents, solicited business and sold and shipped goods and merchandise to points in other states. Held, that such transactions were 'interstate commerce,' and that a state law providing that no foreign corporation shall transact any business or maintain any action in such State without having first filed their articles of incorporation with the secretary of state is void, as being a violation of the interstate commerce law, and cannot operate to deprive such corporation of its right to bring an action in such State."

On page 932 the Court said:

"The principle is well established that it rests purely within the discretion of a State to recognize or to repudiate a foreign corporation; that it can, if such be its pleasure, exclude such a corporation entirely, or admit it conditionally. This principle, however, is not of universal application. A very emphatic and well-fixed instance in which it does not obtain is where a foreign corporation is engaged in interstate or foreign commerce. That

provision of the Federal Constitution which provides that 'Congress shall have power to regulate commerce with foreign nations, and among the several States,' constitutes such regulation a domain of legislation peculiarly within Federal prerogative."

It will be observed that in the Kansas Supreme Court, the learned Chief Justice, in his opinion, lays much stress upon the fact that the Bush Corporation Act makes no discrimination between foreign and domestic corporations; that it treats them both alike.

In Robbins v. Shelby Taxing District, 120 U. S. 489, 497, this Court thus disposes of a similar contention:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone."

Specification of Errors Nos. 2 and 3.

We will discuss these two specifications of error together. In the opening statement we have pointed out that the Court, while indicating a disposition to protect the rights of the American Book Company in so far as its ability to perform and enforce contracts made prior to the passage of the Bush Act was concerned, when it came to enter judgment failed to do so. The judgment was an absolute writ of ouster pronounced against the plaintiff in error. Under the judgment thus entered against it, it would have no more right to enter the State with its products in fulfillment of any pre-existing contract than it would to make new sales and new contracts. It is excluded from the State absolutely and entirely for all purposes. The doors of the State courts are closed against it. It has no recourse to enforce performance of any obligation due it unless it be through the Federal tribunals. And in view of the jurisdictional requirement, it is obvious that in many instances it does not possess this remedy.

Certainly, this is an anomalous situation, in which the plaintiff in error, through no fault upon its part, finds itself. It is difficult to believe that the Legislature of Kansas could have contemplated

such a purpose by this statute. However this may be, the Supreme Court of the State having thus construed the law and declared such to be its meaning, it must be so accepted in this Court. Thus interpreted, we submit that the Act is clearly void for the reasons stated in these two specifications of error. There was something more than an alteration in the remedy accomplished by this statute. It is the withdrawal and denial of all remedy whatsoever, and is, therefore, clearly a denial to the plaintiff in error of the equal protection of the law and of due process of law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and an impairment of its existing contracts.

Specification of Error No. 4.

The vital and controlling question in this case is the one discussed under specification of error No. 1. If we are right in our position there taken, the judgment is one which the Supreme Court of Kansas had no right nor power to make. We therefore respectfully submit that the judgment should be reversed and the cause remanded, with

instructions to enter a judgment in favor of the plaintiff in error.

W. H. Rossington,
Chas. Blood Smith,
Clifford Histed,
Attorneys for Plaintiff in Error.

As to the Motion to Dismiss.

Since preparing the foregoing brief on the merits, we have been served by the defendant in error with notice of a motion to dismiss this writ of error. The motion is made upon the ground that the question involved has been determined by the act of plaintiff in error in complying with the judgment of the Supreme Court of Kansas.

We also have notice that proof will be filed in support of this motion, but its nature is not disclosed. We assume that such proof will be transcripts of the records of the charter board, showing that the American Book Company has paid some thirteen hundred dollars, and in other respects met the exactions of the Bush Corporation Act.

We, of course, admit the force of the rule that where there is nothing for this Court to determine—where the question between the parties is at rest and only a moot question is presented—this Court will refuse to consider the appeal.

We have filed counter-affidavit and proof to show that this controversy is still unsettled and undetermined; that there is sought to be visited upon the American Book Company by the State of Kansas the force and effect of the judgment to review which this writ of error is prosecuted, and that the State is contending further that the compliance above adverted to is no compliance because it was made too late.

This claim is put forth in a suit brought by the State to cancel and set aside as void certain contracts made by the American Book Company with the State Text Book Commission, permissive in their character, and under which the Book Company agreed to furnish and sell to the public schools of the State for a period of five years certain text books. The judgment of ouster was pronounced against the plaintiff in error in the latter part of July, 1902, but it had already entered into these contracts and was under heavy bond to commence performance by the first of September. The time was therefore pressing, and under the stress of this public necessity and the bonds which it had given for performance, it felt coerced to make the payments aforesaid and to otherwise comply with the statute as interpreted by the Su-

preme Court in the case at bar. Almost immediately, however, the State instituted the action referred to to vacate and set aside the contracts and to declare them illegal and void because of the fact that they were executed prior to the time the American Book Company had received authority from the charter board to transact business in Kansas.

These facts are set forth at length in an affidavit filed in this Court by us in resistance of the motion, to which we have attached a copy of the brief on the part of the State upon this question. We cannot, nor can this Court, in this case undertake to determine or anticipate what the decision of the Supreme Court shall be in this pending cause. At all events, it conclusively appears from this proof, which will not be denied, that the American Book Company is still under the stress of this statute, and that the State is still seeking to exclude it from doing business by virtue of its requirements.

Manifestly, the assertion by the State in said controversy that the compliance with the statute by the American Book Company and the payment of the charter fees under the provisions of the Corporation Act came too late and did not protect the

contracts is the equivalent to a declaration that the Company has not complied at all. It necessarily, therefore, again raises the question of the power of the State to impose such a condition upon the right of the Book Company to engage in the business of interstate commerce within the borders of the State of Kansas, because it stands as one of the conceded propositions in the case that the business appurtenant to these permissive contracts is interstate.

We therefore submit that this is not a moot question before this Court, but a vital question between the same parties to this same controversy, and calls for a decision of this Court. It is to be presumed that the State Supreme Court will adhere to its former ruling concerning the right of the State to regulate foreign corporations engaged in interstate commerce, and upon such adherence pivots the existing and dependent controversy which, as this Court will observe, is identical as to subject-matter and parties with the suit at bar.

Under the circumstances, therefore, the reason of the rule in this Court ceasing, the rule itself ceases. The State continuing to assert the principle of this decision against the American Book

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Company ought not to be heard to say that the matter in controversy is put at rest.

All of which is respectfully submitted.

W. H. Rossington,
Chas. Blood Smith,
Clifford Histed,
Attorneys for Plaintiff in Error.

APPENDIX.

Sec. 1259. CHARTER BOARD.—Sec. 15. There is hereby created a charter board, to be composed of the attorney-general, the secretary of state, and the state bank commissioner. The attorney-general shall be the president and the secretary of state the secretary of said board. [L. 1898, ch. 10, sec. 1; January 11, 1899.]

Sec. 1260. APPLICATION FOR CHARTER.—Sec. 16. Persons seeking to form a private corporation under any of the laws of this State, or any corporation organized under the laws of any other State, Territory, or foreign country, and seeking to do business in this State, shall make application to said board, upon blanks supplied by the secretary of state, for permission to organize a corporation, or to engage in business as a foreign corporation in this State. Such application shall set forth—

If a corporation to be organized under the laws of this State: 1st. The name desired for such corporation. 2d. The place where its principal office or place of business is to be located. 3d. The length of time for which said corporation is to exist. 4th. The full nature and character of the business in which it proposes to engage. 5th. The names and addresses of the proposed incorporators. 6th. The proposed amount of the capital stock.

If a corporation organized under the laws of another State, Territory, or foreign country, and seeking to do business in this State: 1st. A certified copy of its charter or articles of incorporation. 2d. The place where its principal office or place of business is to be located. 3d. The full nature and character of the business in which it proposes to engage. 4th. The names and ad-

dresses of the officers, trustees or directors and stockholders of the corporation. 5th. A detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine the solvency of the corporation. Such statement shall be subscribed and sworn to by the president and secretary or by the managing officer of said corporation. [Id., sec. 2.]

Sec. 1261. Fees; Service of Process.—Sec. 17. Each application for permission to organize a corporation, or to engage in business in this State as a foreign corporation, shall be accompanied by a fee of twenty-five dollars, to be known as an application fee; and in all cases where such applications are made by corporations organized under the laws of any other State, Territory or foreign country, and as a condition precedent to obtaining authority to transact business in this State, said corporation shall file in the office of the secretary of state its written consent, irrevocable, that actions may be commenced against such corporation in the proper court of any county in this State in which the cause of action arose, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation, and shall be executed by the president and secretary of the company, authenticated by the seal of the corporation, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the said secretary and president to execute the same. Every foreign corporation now doing business in this State shall, within thirty days from the taking effect of this

act, file with the secretary of state its written consent as above specified. [Id., sec. 3.]

Sec. 1262. Actions, Where Brought; Record. —Sec. 18. Actions against any corporation organized under the laws of any other State, Territory, or foreign country, and doing business in this State, may be brought in any county where the cause of action arose or in which the plaintiff may reside. The summons shall be directed to the secretary of state, and shall require the defendant to answer by a certain day, not less than forty days nor more than sixty days from its date. Said summons shall be forthwith forwarded by the clerk of the court to the secretary of state, who shall immediately forward a copy thereof to the secretary of the corporation sued; and thereupon said secretary of state shall make return of said summons to the court whence it issued, showing the date of its receipt by him, the date of forwarding such copy, the name and address of the person to whom he forwarded said copy, and the costs for service and return thereof. Such return shall be under his hand and seal of office, and shall have the same force and effect as a due and sufficient return made by the sheriff on process directed to him. Said secretary of state shall keep a suitable record book, in which he shall docket every action commenced against a corporation, the time when commenced, the date and manner of service; also, the date of the judgment, its amount and costs, and the date of payment thereof, which shall be certified from time to time by the clerk of the court. There shall be taxed as costs a fee of two and one-half dollars for each case so docketed, which fee shall be collected as other costs in the case, and forwarded by the clerk of the court to the state treasurer, who shall execute his receipt therefor in duplicate, one to be mailed to

the clerk of the court, and the other to be filed with the secretary of state. [Id., sec. 4.]

Sec. 1263. MEETINGS OF BOARD; INQUIRY.—Sec. 19. The charter board shall hold at least one meeting each month in the office of the secretary of state, and at such other times as may be deemed necessary, subject to call by the secretary. The board shall make a careful investigation of each application, and shall inquire especially with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted, and the secretary of the board shall issue a certificate setting forth the fact that the persons named in the application have been authorized by the charter board to form a private corporation as set forth in the application, reciting the proposed name and character thereof. In passing upon the application of a foreign corporation, the board shall also make special inquiry with reference to the solvency of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that such corporation is properly organized in accordance with the laws of the State, Territory or foreign country under which it is incorporated, that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be organized in this State, the application shall be granted, and the secretary of the board shall issue a certificate setting forth the fact that the application has been granted and that such foreign corporation may engage in business in this State as hereinafter provided. [Id., sec. 5.]

Sec. 1264. CHARTER FEE.—Sec. 20. Each cor-

poration which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent; and for each million or major part thereof over and above the sum of five hundred thousand dollars, two hundred dollars. The treasurer shall execute his receipt therefor in triplicate, one of which receipts shall be delivered to the party making the payment, one to the auditor of state, and the other shall be indorsed upon the charter; and it shall be unlawful for the secretary of state to file or accept for filing any charter or to issue a certified copy of any charter of any corporation required by the provisions of this act to pay a charter fee which does not have such receipt for the proper fee indorsed thereon by the state treasurer. In addition to the charter fee herein provided, the secretary of state shall collect a fee of two dollars and fifty cents for filing and recording each charter containing not to exceed ten folios, and an additional fee of twenty-five cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this State, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the State, Territory, or foreign country under whose laws they are incorporated;

and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner and to the same extent as is herein provided for the chartering and organizing of new corporations. [L. 1898, ch. 10, sec. 6, as amended by L. 1901, ch. 125, sec. 1; May 1.]

Sec. 1283. ANNUAL STATEMENTS; PENALTY; TRANSFER OF STOCK; FORFEITURE; ACTION NOT MAINTAINED.—Sec. 39. It shall be the duty of the president and secretary or of the managing officer of each corporation for profit doing business in this State, except banking, insurance and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the post office address of each, and the number of shares held and paid for by each. 6th. The names and post office addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such reports shall be made upon and in conformity to blanks prepared by the secretary of state and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The secretary of state may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and

the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this State, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney-general to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation; and such failure to file such statement by any corporation doing business in this State and not organized under the laws of this State shall work a forfeiture of its right or authority to do business in this State, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official State paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this State, as soon as any transfer, sale or change of ownership of any such stock is made, as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the secretary of state shall be *prima facie* evidence of the stockholders of such corporations, the number of shares held by each, and the amount paid on each share of capital stock. No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State without first obtaining

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the certificate of the secretary of state that statements provided for in this section have been properly made. [L. 1898, ch. 10, sec. 12, as amended by L. 1901, ch. 125, sec. 3; May 1.]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 126.

THE AMERICAN BOOK COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL. GALEN NICHOLS, COUNTY ATTORNEY OF SHAWNEE COUNTY, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *State of Kansas*, } ss:

Chas. Blood Smith, being first duly sworn, upon his oath deposes and says:

That he is one of the counsel of the American Book Company in this cause, and is personally knowing to the matters and things hereinafter stated.

And affiant says that it is true that after the decision of the supreme court in the above-entitled cause, and after the appeal had been taken and allowed, but before the same was finally perfected, the American Book Company did submit to the terms of said statute and did pay the said charter fee for the following reasons:

That the Text-Book Commission Company was not a party to the suit herein pending and might assert that it was not bound thereby; that the said American Book Company had, as appears from this record, given bond in a large amount for the due performance of its contract, and in addition thereto had, in preparation for the performance of such contract, expended a large amount of money.

And affiant further says that under the terms of its said contract and agreement it had only until the 15th of September in which to supply the wants of the public schools in Kansas with the books it had contracted to deliver, and under the stress of this public necessity, and under the sanction and penalties of its contract, it felt coerced to make the payment aforesaid and to otherwise comply with the statute as interpreted by the Supreme Court in the case at bar.

That thereupon the said State of Kansas almost immediately instituted another suit in the district court of Shawnee county, Kansas, asserting that, inasmuch as such compliance was made after the contracts had been signed, the same came too late and the right to do the particular business the doing of which was sought to be questioned in the suit at bar, and which, as appears in the record in this case, is wholly a business of interstate commerce, was not authorized or perfected by such compliance; that, on the contrary, as to such business it was the same as if no compliance had been made at all.

That the said suit was instituted by the same law officer of the State and in the name of the State as the suit at bar, and in its said petition the State prayed for the annulment of the contracts which the said American Book Company

had made with the Text-Book Commission, appearing at large in the record herein, and that the performance of such contract should be perpetually enjoined.

An application was made to the said district court of Shawnee county for a temporary injunction, which was refused, and thereupon an appeal was prosecuted to the supreme court of the State of Kansas, which appeal is therein pending at the present time and undetermined; that, as appears by the brief recently filed by the State of Kansas in said cause, the said State is contending that the judgment of the supreme court of the State of Kansas here complained of is binding and conclusive upon the American Book Company, and that it amounts to an adjudication that the said American Book Company had not the right to perform the contracts in question in Kansas by reason of the fact that at the time said contracts were entered into the said Book Company had not complied with the requirements of the statute of the State of Kansas in that behalf, as adjudged by the said supreme court of the State of Kansas in the case at bar.

That the supreme court of the State of Kansas is asked to determine this question upon its merits and of necessity to reassert and reaffirm the decision made in the case here upon appeal. In evidence of this contention we hereunto append, marked "Exhibit A," a copy of the brief filed by the State of Kansas in that cause, which affiant declares was duly served upon him as one of the counsel for the American Book Company.

That in said cause we have again invoked the protection of section 8 of article 1 of the Constitution of the United States, and the controversy thereby made is still pending

and undetermined in the supreme court of the State of Kansas. As evidence that we have done so, we hereto attach, marked "Exhibit B," that portion of our brief in which we again argue this question before the Supreme Court of the United States, which we assert is a part of the brief which we have prepared and are about to file in said cause.

Affiant further declares that between the parties to this suit there still exists a controversy, undetermined and unsettled, involving the right of the State to enforce this statute against a corporation engaged entirely in the doing of interstate commerce business to prevent such corporation from transacting such business within the State of Kansas unless the terms and provisions of said statute are complied with.

And further affiant saith not.

CHAS. BLOOD SMITH.

Subscribed and sworn to before me this 29th day of October, A. D. 1903.

[SEAL.] E. B. NELSON,
Notary Public.

Commission expires January 18, 1907.

EXHIBIT "A."

IN THE SUPREME COURT, STATE OF KANSAS.

THE STATE OF KANSAS, *Plaintiff in Error*,
vs.
THE AMERICAN BOOK COMPANY ET AL., *Defendants in Error.*
No. 13348.

BRIEF FOR PLAINTIFF IN ERROR.

OTIS E. HUNGATE,
County Attorney,
QUINTON & QUINTON,
G. C. CLEMENS,
Attorneys for Plaintiff in Error.

(Here follows brief, omitted in printing.)

* * * * * * *

EXHIBIT "B."

EXTRACT FROM BRIEF OF AMERICAN BOOK COMPANY IN STATE OF KANSAS v. AMERICAN BOOK COMPANY—SUPREME COURT OF KANSAS.

The Questions Involved in the Quo Warranto Case of Necessity Revived in this Case in the Event of a Decision Favorable to Plaintiff in Error on the Merits.

In anticipation of any adverse decision by the court in this case on the merits. we desire to here announce that we deny the ultimate controlling force of the decision of this court in the case of The State *ex rel.* Galen Nichols against The American Book Company *et al.*, known in this argument as the *quo warranto* case, heretofore decided. A decision by this court that full compliance with the law by taking out a permit and paying a charter fee under the provisions of the corporation act came too late and did not protect the contracts would be equivalent to a decision that the company has not complied at all and would of necessity again raise the question of the power of the State to impose such a condition upon the right to engage in the business of interstate commerce within the borders of the State of Kansas. A reference to the record in the *quo warranto* case shows that it was asserted in a timely fashion that these provisions of the Kansas law were inapplicable to the business done or contemplated by the American Book Company and could not be interposed as a restraint upon the free

transaction thereof, and the court, assuming that this business was wholly interstate, held that none the less were the terms of the statute and all the terms of the statute applicable to a foreign corporation seeking to engage solely in interstate commerce in Kansas. We controverted the soundness of that position of the court then and we controvert it now, and we respectfully suggest and predict that this court will ultimately overrule its decision. The American Book Company has taken the case in question to the Supreme Court of the United States, and it is there pending.

We are here again met with this question in another form, because, without the assumption that the decision of this court in that case is sound in law, this case would have no substratum to stand upon. It is only by assuming in the first instance that the company was compelled to pay this large charter fee and otherwise comply with the terms of this statute that any support is found to the proposition that it paid it too late to save pre-existing contracts from being declared void. It is therefore an inescapable question in this case, and the court, to sustain the position of the plaintiff in error, is bound to again hold that these particular provisions of the statute are coercive upon the American Book Company in respect to the doing of an interstate-commerce business. The pleadings, which are part of the proof in this record, the contracts themselves, and the opinion of the court in this case make this clear.

We, therefore, ask that if the court is going to determine this case upon its merits, it shall revise its former judgment, which we assert to be erroneous.

We will not argue this question at length, but will restate in a few words the propositions of law, with appropriate

citations of authority upon this head, and ask that the court will read and consider them with a view of determining the rightfulness of its prior decision, being convinced that a candid and careful revision of its judgment will compel the overruling of the decision already made. We renew our contention in that case here and submit that chapter 10 of the Session Laws of 1898, as amended by chapter 125 of the Laws of 1901, in so far as they apply to foreign corporations engaged solely in the business of interstate commerce, constitute a regulation and restriction of such commerce within the prohibition of section 8 of article 1 of the Constitution of the United States and are therefore void.

Crutcher vs. Kentucky, 141 U. S., 47.
Hooper vs. California, 155 U. S., 648, 652.
Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727, 734.
Pembina, etc., Consolidated Milling Co. vs. Pennsylvania, 125 U. S., 181.
Schollenberger vs. Pennsylvania, 171 U. S., 1, 23.
Hopkins vs. United States, 171 U. S., 578, 597.
Leloup vs. Port of Mobile, 127 U. S., 640, 644.
Brennan vs. Titusville, 153 U. S., 289, 303.

[Endorsed:] No. —. United States Supreme Court. American Book Company *vs.* State of Kansas *ex rel.* Galen Nichols, county attorney. Affidavit. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24, Crawford building, Topeka, Kansas, attorneys for plaintiff.

[Endorsed:] File No. 18,658. Supreme Court U. S., October term, 1903. Term No. 126. The American Book Co., pl'ff in error, *vs.* The State of Kansas *ex rel.* Galen Nichols. Affidavit of Chas. Blood Smith. Filed Nov. 2d, 1903.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 30 1903
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

October Term, 1903.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

THE AMERICAN BOOK COMPANY,
Plaintiff in Error,
vs.
THE STATE OF KANSAS, *ex rel.* GALEN NICHOLS, COUNTY ATTORNEY OF SHAWNEE COUNTY,
Defendant in Error.
} No. 126.

MOTION TO DISMISS, NOTICE, AND BRIEF FOR DEFENDANT IN ERROR.

QUINTON & QUINTON,
OTIS E. HUNGATE,
G. C. CLEMENS,
Counsel for Defendant in Error.

CRANE & CO., TOPEKA.

IN THE

Supreme Court of the United States.

October Term, 1903.

THE AMERICAN BOOK COMPANY,
Plaintiff in Error,
vs.
THE STATE OF KANSAS, *ex rel.* GALEN NICHOLS, COUNTY ATTORNEY OF SHAWNEE COUNTY,
Defendant in Error.
} **No. 126.**

NOTICE.

To the Attorneys for Plaintiff in Error:

You are hereby notified that on Monday, November 2, 1903, the defendant in error will submit to the Supreme Court of the United States the motion served herewith, documentary evidence in support thereof, and the accompanying brief.

Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1903.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

THE AMERICAN BOOK COMPANY,
Plaintiff in Error.
vs.
THE STATE OF KANSAS, *ex rel.* GALEN NICHOLS, COUNTY ATTORNEY OF SHAWNEE COUNTY,
Defendant in Error.
} No. 126.

MOTION TO DISMISS.

Now comes the said defendant in error and moves the court to dismiss this writ of error, for the reason that the plaintiff in error, after the rendition of the judgment complained of and before suing out said writ of error, fully complied with the statute of the State of Kansas mentioned in said judgment and upon which said judgment was based, and thereby acquired and now has full authority to do business in said State; so that there remains only a moot case before this court for hearing and decision, and its judgment could not "affect the result as to the thing in issue in the case before it."

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Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1903.

THE AMERICAN BOOK COMPANY,
Plaintiff in Error,
vs.
THE STATE OF KANSAS, *ex rel.* GALEN NICHOLS,
COUNTY ATTORNEY OF SHAWNEE COUNTY,
Defendant in Error.
} No. 126.

ON MOTION TO DISMISS.

BRIEF FOR DEFENDANT IN ERROR.

This was a *quo warranto* brought by the State of Kansas in its Supreme Court to oust the plaintiff in error, a New Jersey corporation, from doing business in the State without having complied with the State's laws in that regard. An attempt was made to couple with this an attack upon certain contracts already made by the corporation, but the court below having held that, as to this matter, it had no jurisdiction, of course that subject is not before this court. The judgment below was as follows:

That "the Company be ousted from the exercise of the right to transact business as a corporation in the

State of Kansas, *until its compliance with the statutes of this State*, providing for the making of an application to the Charter Board of the State of Kansas to do such business, and the filing of a certified copy of its charter or articles of incorporation, and a statement of the matters and things required by section 2 of chapter 10 of the Special Laws of 1898, and the payment of the fees required by law."

(Printed Record, pp. 31, 32.)

August 5, 1902, six days before the writ of error was sued out, the plaintiff in error did all the things required by this judgment, and fully complied with the law; so that a reversal of the judgment could give the plaintiff in error nothing it does not already enjoy, and, of course, only a legislative appropriation could give it back its charter fee. There is nothing here to decide but a moot case.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the

plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

Kimball v. Kimball, 174 U. S. 158.
Mills v. Green, 159 U. S. 651.
Singer Manufacturing Co. v. Wright, 141 U. S. 696.
Little v. Bowers, 134 U. S. 547.
Flour Inspector v. Glover, 160 U. S. 170.
Codlin v. Kohlhausen, 181 U. S. 151.

QUINTON & QUINTON,
OTIS E. HUNGATE,
G. C. CLEMENS,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 126.

THE AMERICAN BOOK COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL. GALEN NICHOLS, COUNTY ATTORNEY, &C.

STATE OF KANSAS,
Office of the Secretary of State.

[Vignette.]

I, J. R. Burrow, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the record and proceedings had by and before the charter board of the State of Kansas with reference to application of the American Book Company, a corporation incorporated under the laws of the State of New Jersey, to be permitted to do business in the State of Kansas.

In testimony whereof I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 28th day of October, 1903.

[Seal Secretary of State, State of Kansas.]

J. R. BURROW,
Secretary of State.

August 4, 1902, there was filed by the American Book Company with the secretary of state of the State of Kansas, as secretary of the charter board, a certain application, of which, with all the endorsements thereon, the following is a true copy:

Application for Authority to Engage in Business in the State of Kansas as a Foreign Corporation.

To the Charter Board of the State of Kansas:

The American Book Company, a corporation organized under the laws of the State of New Jersey, applies for permission to engage in business in the State of Kansas, and for that purpose submits the following statement, to wit:

FIRST.

A certified copy of its charter or articles of incorporation, which is filed herewith.

SECOND.

The place where the principal office or place of business of said corporation is located is 15 Exchange place, Jersey City, New Jersey.

THIRD.

The full nature and character of the business in which said corporation proposes to engage within the State of Kansas is supplying school text books.

FOURTH.

The names and addresses of the officers and trustees or directors are:

H. T. Ambrose, Orange, New Jersey.
A. C. Barnes, vice-president, Brooklyn, N. Y.
C. P. Batt, treasurer, Tarrytown, N. Y.
Gilman H. Tucker, secretary, New York city.
C. J. Barnes, Chicago, Ill.
H. B. Barnes, New York city.
L. M. Dillman, Chicago, Ill.
John Arthur Greene, New York city.
A. H. Hinkle, Bar Harbor, Maine.
D. B. Ivison, New York city.
W. B. Thalheimer, Cincinnati, Ohio.
Henry H. Vail, New York city.

FIFTH.

Resources.	Dollars. Cts.	Liabilities.	Dollars. Cts.
Bills receivable	$256,898.94	Capital paid up	$5,000,000.00
Real estate	1,820.71	Surplus	1,223,821.74
Personal property	5,287,557.11	Undivided profits	
Stocks, bonds, and other securities		Bills payable	448,500.00
Merchandise	1,255,380.31	Accounts payable	146,541.86
Cash on hand	190,357.97	Bonded indebtedness	800,000.00
Due from banks		Encumbrance on real estate or plant	
Accounts receivable	626,848.56		
Judgments			
Total	$7,618,863.60	Total	$7,618,863.60

SIXTH.

The amount of the capital stock of said corporation is five million dollars, divided into fifty thousand shares of one hundred dollars each.

We further state that the above application is made in good faith, with the intention that said corporation shall actually engage in the business specified and none other.

STATE OF NEW YORK, }
New York County, } ss:

I, H. T. Ambrose, president, and I, Gilman H. Tucker secretary, of the above-named corporation, do solemnly swear that the above is a full and complete statement of the resources and liabilities of said corporation as shown by the books of the same, and that said statement and the several matters and things contained in this application are true in every particular to the best of my knowledge and belief. So help me God.

H. T. AMBROSE, *President.*
GILMAN H. TUCKER, *Secretary.*

Subscribed and sworn to before me this 26th day of July, A. D. 1902.

[SEAL.] W. L. BILLMYER,
Notary Public, Kings Co., No. 75.

Cert. filed in N. Y. county.
(My commission expires March 30, 1904.)

TOPEKA, KANS., *Aug.* 5, 1902.

Received of Geo. A. Clark eleven hundred dollars, charter fee.

F. E. GRIMES, *St. Treas.*,
By C. R. RICHEY.

Together with a copy of the charter of said company and an alphabetical list of the stockholders of said company and their respective residences; said company having already filed, May 5, 1902, with the secretary of state, as secretary of said charter board, its irrevocable power of attorney, of which, with the resolution authorizing it, the following is a true copy:

Resolution by the American Book Company of New Jersey.

30TH APRIL, 1902.

At a meeting of the directors of the American Book Company, duly held at the office of said company on the 30th day of April, 1902, Mr. A. C. Barnes offered the following resolution and moved its adoption:

Resolved, That the president and secretary of this company be, and they are hereby, authorized and instructed to execute the written consent thereof to be sued in the State of Kansas in the manner provided in section 3 of an act of the legislature of the State of Kansas concerning private corporations, approved January 7, 1899.

The resolution was adopted.

STATE OF NEW YORK, }
County of New York, } ss:

Gilman H. Tucker, being duly sworn, says he is secretary of the American Book Company of New Jersey, and that the foregoing is a true and correct copy of a resolution adopted by the board of directors of said American Book Company on the 30th day of April, 1902, together with the minutes concerning said resolution.

GILMAN H. TUCKER, *Secretary.*

Sworn to and subscribed before me this 30th day of April, 1902.

[SEAL.] W. L. BILLMYER,
Notary Public, Kings County, No. 75.

Cert. filed in N. Y. county.
(My commission expires March 30, 1904.)

Know all men by these presents that the American Book Company, a corporation organized under the laws of the State of New Jersey and with its principal office at Jersey City, in said State, hereby consents, without power of revocation, that actions may be commenced against it, the said American Book Company, in the proper court of any county in the State of Kansas in which a cause of action against such corporation may arise, or may have heretofore arisen, or in which plaintiff may reside, by service of process on the secretary of state of the State of Kansas; and the said corporation stipulates and agrees that such service shall be taken and held in all courts to be as valid and binding as

if due service had been made upon the president or any other chief officer of said corporation.

In witness whereof said corporation has caused these presents to be executed by its president and its secretary and authenticated by its corporate seal at New York, in the State of New York, this 30th day of April, A. D. 1902.

[SEAL.] H. T. AMBROSE, *President.*

Attest: GILMAN H. TUCKER, *Secretary.*

Filed for record May 5, 1902.

GEO. A CLARK,
Sec'y of State.

[Endorsed:] Approved by charter board this 4th day of August, 1902. Morton Albaugh, Geo. A. Clark, State charter board.

And the said application, coming on to be heard before the charter board of the State of Kansas, was, August 5, 1902, duly granted by said board. Whereupon, by order of said board, the usual certificate was issued and delivered to said The American Book Company, of which said certificate the following is a true copy:

Certificate.

It is hereby certified that at a meeting of the charter board of the State of Kansas, duly and legally held at the capitol of said State on the 4th day of August, 1902, the application of the American Book Company, a corporation organized and existing under the laws of the State of New Jersey, to

engage in business within the State of Kansas, was heard, and in pursuance of action then taken thereon—

It is hereby further certified that said The American Book Company is, by the said charter board, authorized to engage in the business of supplying school text books in the State of Kansas until this certificate shall be revoked or said authority canceled in accordance with law.

Done at Topeka, Kansas, this 5th day of August, A. D. 1902.

[SEAL.] GEO. A. CLARK,

Secretary Charter Board of the State of Kansas.

FILE COPY.

Office Supreme Court
FILED
JAN 5 190
JAMES H. McKENNEY,

In the Supreme Court
of the United States.

October Term, 1903.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

THE AMERICAN BOOK COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, *ex rel. Galen Nichols, County Attorney of Shawnee County,*
Defendant in Error.

No. 126.

BRIEF FOR DEFENDANT IN ERROR.

C. C. COLEMAN,
Attorney-general.
OTIS E. HUNGATE,
County Attorney.
A. B. QUINTON,
E. S. QUINTON,
G. C. CLEMENS,
Special Counsel for the State of Kansas.

In the Supreme Court
of the United States.

October Term, 1903.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

THE AMERICAN BOOK COMPANY, *Plaintiff in Error,*
vs.
THE STATE OF KANSAS, *ex rel. Galen Nichols, County Attorney of Shawnee County, Defendant in Error.*
No. 126.

BRIEF FOR DEFENDANT IN ERROR.

BEFORE proceeding to discuss the merits, we shall briefly reply to the brief of plaintiff in error in opposition to our

MOTION TO DISMISS.

The facts are undisputed. Before suing out this writ of error the plaintiff in error had fully performed the judgment it seeks to reverse; had fully complied with the law it seeks to annul, and was, as it still is, in the full enjoyment of the

fruits of that compliance and performance. Were the judgment reversed, that reversal could have no practical effect whatever so far as *this* case is concerned, and *this* is the only case at present before the court. The plaintiff in error does not deny this, and it expressly admits the rule laid down by this court in such cases (brief, p. 35); but it seeks to escape the consequences by affirming that this court might "declare principles or rules of law" which, while they "cannot affect the matter in issue in the case before it" (Mills v. Green, 159 U. S. 651–653), would be convenient to have for use in *another* case. This court has heard that appeal before, but to this date it has produced no effect upon the judicial heart. In California v. San Pablo & Tulare Railroad Co., 149 U. S., the attorney-general of California "contended that a determination of the question whether the tax was valid was of the utmost importance to the people of the state," and, besides, "stipulations had been made in other similar cases that they should abide the judgment of this court" in that case; but this court was deaf to the appeal and contented itself with the declaration:

> "This court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

If the court should ever deviate from this rule, surely the case of Kimball v. Kimball, 174 U. S. 153, presented a strong reason for deviation, but the rule was inflexibly applied.

The only controversy here was whether the plaintiff in error was compelled to comply with the state law in order to be entitled to carry on its business in the state. The supreme court of the state, in the judgment brought here, ruled that question against the plaintiff in error. It thereupon fully complied with the law and was admitted to carry on business in the state; it has its certificate to that effect from the state's Charter Board, and the controversy, so far as this case is concerned, is at end. Nothing this court could do in this case could be of any benefit whatever to the plaintiff in error, *so far as this case is concerned*. True, counsel claim that "the American Book Company is still under the stress of this statute" (brief, p. 37), but it is not "under the stress of this statute" *in this case*. In the two cases referred to above, the parties were considerably "under the stress" of disagreeable things, but that seems to have made no difference with this court.

In the case now pending in the supreme court of Kansas, we make use of that judgment for two purposes only: As concrete proof of a fact obviously capable of other readily accessible evidence —that when the transactions with the State Text-

book Commission took place the American Book Company had not complied with the Bush corporation act; and that the alleged acts of the state's officers do not estop the state from questioning the validity of the contracts which the State Text-book Commission assumed to make; a proposition in support of which, regardless of the judgment, we cite in our brief abundant authority, including the decisions of this court. We make no other use of the judgment, and we do not even refer to it *as* a judgment essential to the state's right to judgment in the pending case. Were the judgment reversed, the reversal could have no effect on the case now pending in the supreme court of Kansas, as this court long ago decided.

THE MERITS.

What the Case Was.

Although somewhat obscured by a parade of federal questions and a shrewdly constructed brief on the other side, the question in this case —for there is but o —is simple, and not difficult of solution.

In 1897 the legislature of Kansas created a State Text-book Commission to select text-books for all the public schools of the state for a period of five years. Bids were to be received from publishers, contracts were to be executed with the successful bidders, and they were to give bonds for the performance of their contracts; thereupon

the governor was to issue his proclamation announcing the result, and it was made unlawful to thereafter use in the public schools any but the selected books during the life of the contracts. Books previously in use were to be accepted in exchange at a certain rate. The act contained these provisions pertinent here:

"Within thirty days after the issuing of the proclamation by the governor of this state provided for in this act, any person, persons, company or corporation having contracted for the furnishing of school text-books to the people of this state, for use in the public schools thereof, shall arrange with at least one dealer or agent at the county-seat in each county in this state for the handling, sale and exchange of the school-books provided for in this act. Such dealer or agent shall be allowed to charge the people of this state a commission not exceeding ten per cent. on the contract price, established in this act for the handling and sale of such books: *Provided*, That any person, company or corporation having a contract under the provisions of this act shall be required to furnish books to any citizen or school district in Kansas at the same price and on the same terms as provided for the furnishing of such books to dealers or agents, in cash orders of not less than ten dollars each, and deliver the same at any railroad station in Kansas mentioned in such order."

"At the annual meeting to be held in the various school districts in this state in 1897, and at each annual meeting thereafter, and at the meeting of the board of education of cities of the first or second class, an estimate shall be made of the number of school text-books needed in each of said schools for the term next commencing therein,

and the clerk of each school district and the clerk of the board of education in each city of the first or second class shall report the same to the county superintendent of public instruction immediately, and not later than the 1st day of August next thereafter; and the county superintendent of public instruction shall, as soon as possible, and not later than August 10 of each year, and oftener if the necessity of the schools require it, make out his requisition from the reports so received, and from other sources, and send it to the school-book publisher or publishers having contracts under the provisions of this act, stating therein the number of books of each kind needed for the schools of such county."

"Every contract with any person, company or corporation, publisher or publishers of school text-books for use in the schools of this state shall be for five years from the date thereof; and no school-district board or board of education of any city of the first or second class shall adopt, use or permit to be used any other school text-books than those provided for in this act."

"Any person or persons who shall directly or indirectly demand or receive any money, promise or any other thing of value for any book or books provided for in this act in excess of the contract-price, together with ten per cent. herein provided for for dealers or agents, and any member of any such district board, or any member of any school board in any city of the first or second class, or any teacher of any school, who shall adopt, use or permit to be used, or cause to be used in any public school of this state, any other text-book or books than those provided for in this act, shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction shall be fined in any sum not less than twenty-five dollars or more than one hundred dollars, or

by imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment: *Provided,* That in estimating the price at which the dealers or agents may sell books under the provisions of this act, the total amount of each sale shall not vary to exceed one-half of one cent above the contract-price, plus ten per cent. provided for herein."

Kan. Gen. Stat. 1901, §§6467, 6468, 6471, 6477.

At the special session of 1898 the legislature enacted what is known as the "Bush corporation law," a copy of which is appended to the brief for the plaintiff in error, requiring foreign corporations "seeking to do business" in Kansas to make application to the State Charter Board, created by that act, and to do certain things, including the payment of a charter fee graduated according to the amount of their capital stock. At the quinquennial session of the State Textbook Commission, in May, 1902, the plaintiff in error, a New Jersey corporation, not having fully complied with the Bush corporation law, submitted bids for school-books to be furnished for the next five years, and its bids were accepted as to forty-five per cent. of all the text-books to be supplied. We may assume that it was supposed there was "something rotten in Denmark," for the county attorney of Shawnee county, the county in which the capital of the state is situated, promptly instituted a suit in the district court of that county to prevent the signing of the

contracts. He was too late, however, for the officers, moving with great diligence, had already signed them. But the governor had not yet issued his proclamation, and, June 7, 1902, the same county attorney brought this action in the supreme court of the state to oust the plaintiff in error and to cancel the contracts. The supreme court held that it had no jurisdiction to entertain a suit for the cancellation of the contracts, but rendered a judgment ousting the company "from the exercise of the right to transact business as a corporation *in the state of Kansas*" until it should comply with the Bush law.

The action was brought under a provision of the Kansas code of civil procedure, which, so far as important here, is as follows:

"The writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, are abolished, and the remedies heretofore obtainable in those forms may be had by civil action.

"Such action may be brought in the supreme court or in the district court in the following cases:

"*Fourth*. When any corporation *exercises powers not conferred by law*."

Gen. Stat. 1901, §§ 5148, 5149.

The petition avers that the American Book Company is a corporation incorporated under the laws of New Jersey, and then alleges:

"That for more than three years past, said American Book Company *has exercised and still does exercise*, in the state of Kansas and in the

county of Shawnee, *certain corporate powers not conferred upon it by law*, . . . to wit: The corporate power of making, entering into and signing contracts in the said state with school boards, the Kansas School Text-book Commission, and other persons resident of Kansas, for the sale, supplying and furnishing of text-books and the actual furnishing of school-books for use by the pupils of the state of Kansas; the said company during the month of May, 1902, entered into a contract with the Kansas State Text-book Commission, in said county and state, for the furnishing of certain school-books, for use in the schools of Kansas, for the ensuing five years, by the terms of which said contract the said defendant has secured the right to furnish certain books for use in the schools of the state of Kansas from said State Text-book Commission, and is now doing business in the state of Kansas, and is carrying out its said contract by placing the stocks of books in the different counties for sale under said contract, in all of which said business in the sale of its said books, and in the entering into of the contract so described with the said Text-book Commission, and the doing of said business, the said American Book Company was acting and is now acting in said county in violation of chapter 23 of the General Statutes of the state of Kansas of 1902, and the said defendant has unlawfully and wilfully persisted in the violation of the provision of said laws in this, to wit": [Setting forth the particulars in which the company had not complied with the Bush corporation act.]

The prayer is:

"Wherefore the said county attorney, on behalf of said state, prays that the said defendant be required to show by what warrant or authority it exercises corporate rights and enters into and transacts business as a corporation in the state of

Kansas; and *that it may be ousted forever from the exercise of such usurped corporate power*, and that the contract entered into with the Kansas Text-book Commission may be declared null and void, and for such other relief as may be proper, and for the cost of this proceeding."

(Printed record, pp. 1, 2.)

We shall see, as we proceed, that it was matter of judicial knowledge, because matter of public law, that, at the date this petition was filed, an *existing* contract with a school board, or with any person or body save the State Text-book Commission, for the supplying of school-books to the public schools of Kansas, was a legal impossibility. So this petition charged, as the only exercise of corporate power, the making of the contracts of 1902 with the State Commission and placing stocks of books in the counties in pursuance and in performance of those contracts.

The answer denied the petition except as its allegations might be admitted or the denial be qualified by other parts of the answer; and then admitted that the company was a New Jersey corporation, as alleged, and that "on or about the 31st day of May, 1902," it "duly executed certain contracts in writing with the Kansas State Text-book Commission, "copies of which were attached and made part of the answer; that it had executed a bond for the performance of these contracts, which bond had been approved by the

Executive Council of the state; and that it had made certain bids which the Text-book Commission had accepted and which were the basis of these contracts. The answer further alleged that the company had incurred large expense in preparing to perform these contracts, although they had not yet been consummated by a proclamation of the governor, required to put them in force. It was also alleged that the company had some unexpired contracts with school-district boards, for which it claimed the protection of the contract clause of the federal constitution—a matter which, as we shall see, dropped out of the case. Thus far, the answer, as will be observed, admitted all the material allegations of the petition except only the allegations of failure to comply with the Bush corporation act, concerning which, besides pleading estoppel because of the interpretation put upon the act by the attorney-general and the Charter Board, of which he was a member, it alleged:

"The defendant, further answering, says that it has duly complied with all the requirements of the laws of the state of Kansas affecting foreign corporations; has duly filed with the secretary of state its irrevocable consent to be sued in the courts of the state and duly filed with the secretary of state, on or about the 30th day of May, 1902, the annual report of its business, and has received from said secretary of state a certificate *of said facts*, and is thereby authorized to do business in the state of Kansas."

Interstate Commerce.

Up to this point there was nothing in issue but the question, partly of fact and partly of law, whether the company had complied with the Bush corporation act. But the third paragraph of the answer injected into the case, or sought to inject into it, an additional element. That paragraph was as follows:

"And this defendant, further answering, says that at the time of bringing this suit, and now, the business of this defendant within the state of Kansas was and is solely that of interstate commerce. That the only business of any character transacted by this defendant within the state of Kansas has been, and is, that of selling school text-books, reference books, and other publications, to dealers and merchants in the state of Kansas. That this defendant is the owner of certain copyright and prepares and manufactures its own books and publications. That for such purposes this defendant owns and operates in Cincinnati, Ohio, Chicago, Ill., and New York city, certain factories and binderies, wherein the type for its publications is set and the same are completely printed, bound, and prepared for sale and transportation to customers. That this defendant does not now, and did not at the time of bringing this suit, own any property connected with the manufacture and sale of said business within the state of Kansas, *nor any other property whatsoever within the said state.* That this defendant has been, and is now, engaged in selling its said publications to dealers and merchants located at various points in the state of Kansas and other states of the United States, and, in making such sales, packs and ships its said publications over appropriate railroads, consigned to the persons to

whom they are sold, and delivers them to the consignees in the original packages in which they were packed for shipment. That with reference to the state of Kansas all sales of such merchandise made by this defendant are of goods manufactured and shipped from points in other states to points within the state of Kansas and there delivered in the original packages to such purchasers. That this defendant, prior to the passage of the act of 1898, made and executed certain contracts with school districts fixing the price at which this defendant would sell certain publications to the public, which said contracts continued in force at the time of the passage of the said act, and some of which are still in force. That the only purpose and scope of said contracts was the fixing the price at which publications might be sold and delivered by this defendant to such dealers or persons as might thereafter choose to buy. And such contracts are merely incidental features of the interstate business of this defendant hereinbefore set out. That such has been the sole character of the business in which this defendant has been engaged in the state of Kansas for many years last past, and said defendant was engaged in such business at the time of the passage of chapter 10 of the Session Laws of 1898.

"And this defendant, further answering, says that by reason of the premises chapter 10 of the Special Session Laws of Kansas for the year 1898, and chapter 125 of the Session Laws of 1901, do not apply to this defendant, and this defendant is not amenable thereto. That if said statutes be construed as applicable to this defendant, then the same are in violation of the provisions of section 18 of article 1 of the constitution of the United States, in that they seek to regulate and impose burdens and restraints upon interstate commerce, and this defendant hereby expressly

invokes the protection of the said section of the constitution of the United States."

(Printed record, pp. 16, 17.)

If, as is the case, it is as true of decisions of federal questions as of other questions that judgments are not to be reversed for error *without prejudice*, what is to be done with the assignment of error that the supreme court of Kansas gave no heed to this defense? In every interstate-commerce case yet decided here, there has been something *within the state* upon which the obnoxious law could operate. This is true of *every* case cited or quoted by counsel for the plaintiff in error. A drummer, a solicitor of orders, or a *local* agent of some kind was to be fined or imprisoned; the opening of an office in the state was forbidden, under penalties to be inflicted upon the person *within the state* who did the wicked deed; or taxes were to be collected from property *within the state*. This company avers that it has no property "whatsoever" within the state of Kansas. As the fact is not alleged, it must be assumed that the company does not do business through local agents and that no persons solicit orders for it in the state. People purchase books of its home offices, possibly by going there in person, and they are shipped direct to the purchaser in Kansas without the intervention of anybody but the carrier. Under these peculiar circumstances, of *whom*, of *what*, could the Kansas law lay

hold and disturb the serenity of interstate commerce? Obviously the purchaser and the carrier are the only *persons* within the state engaged in the nefarious traffic; and the books *in transit* are the only *things* of which the law could lay hold. *The company* is beyond the reach of the grasping commonwealth pictured in the brief of counsel for the plaintiff in error. The state does not attempt to forbid the citizen from purchasing books nor from having them sent to him. It denounces no punishment against the carrier. It seeks not to confiscate the goods, in transit or after. If the third paragraph of the answer is true, then, pray how could this company be injured by the most stringent enforcement of this law? How can this law, so far as the plaintiff in error is concerned, put the slightest obstacle in the way of interstate commerce? It seems to us the plaintiff in error has pleaded too hard; and that, if error it is, the first error assigned is error without prejudice. There is no such case in the reports from the organization of this court. According to the plaintiff in error, assuming its answer in this respect to be true, the state is fighting a shadow—is engaged in a struggle with the circumambient atmosphere. To this conflict we might apply a little of Shakespeare:

The State of Kansas: "I can call spirits from the vasty deep."

The American Book Company: "But will they come?"

True, there is a provision in the Bush law that a corporation shall not be allowed to sue in the courts of the state unless it shall have done certain things. But this applies to *all* corporations for profit, domestic as well as foreign, and whether they have originally complied with the law or not, and relates to a *subsequent* matter, not to the acquisition of the right to do business in the state. The validity of that provision was not involved or decided in this case; and the right to sue in the courts of a state must be derived from another provision of the federal constitution—it has never been held to be within the protection of the commerce clause.

If the third paragraph of the answer is true, and of course, for the purposes of this assignment, it must be taken as true, the plaintiff in error is immune so far as the Bush act is concerned. It is not itself within the state; it has no local agents; it has no property "whatsoever" within the state's reach.

Indeed, the paragraph is a reasonably good Irish bull. The company says: "The only business I have ever done *in Kansas* has been done in *Illinois, Ohio, and New York!*" For, as we shall see, according to the decisions and fixed law of the very court in which this answer was filed, the business described in this paragraph was business done in the state whence the goods were shipped—not in the state of Kansas.

This judgment was not rendered by a mere *nisi prius* tribunal. It was rendered by the highest court in the state—the court whose decisions are *law*, binding not only upon citizens but upon the court itself. Hence, the judgment is to be interpreted in the light of the law of the state as settled by previous decisions of that court. It is not to be treated as a thing apart. By that judgment the plaintiff in error is "ousted from the exercise of the right to *transact business* as a corporation *in the state of Kansas* until," etc. What does "transact business *in the state of Kansas*" mean? We must suppose an application made to the supreme court to enforce this judgment. Suppose such an application made upon the very facts pleaded in the third paragraph of this answer: what would the court say? It has already said, and what it has said interprets this judgment. It had decided shortly before the rendition of this judgment that just such transactions as are pleaded in the third paragraph of this answer are transactions at the place of shipment—not transactions in the state of Kansas.

The State v. Cairns, 64 Kan. 782.

Williams v. Davidson, 64 id. 707.

Feineman v. Sachs, 33 id. 631.

(See, also, Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 736, 737; Allgeyer v. Louisiana, 165 U. S. 578; 13 Encycl. of L., 2d ed., 870, and cases cited.)

Hence, according to the law as settled for the state by its supreme court before this action was begun, the third paragraph of the answer amounted to no more than a denial that the plaintiff in error was, or ever had been, doing business *in the state of Kansas*. Beyond doubt, the business described is interstate commerce; but equally beyond doubt, it was not business done in the state of Kansas. Had this action been brought by the state of Illinois, in that state, to oust the company from doing business *there*, this would have been a pertinent defense, for ouster would have destroyed the company's business; but in the actual case, what matters it that the business was interstate commerce if it was not business done in Kansas? If a federal question is raised and decided against the party raising it, that, without regard to the correctness of the decision, gives this court jurisdiction; but, in the exercise of that jurisdiction, it will not reverse the judgment, though erroneous as to the federal question, if the judgment should or might have been the same because of general principles of law, regardless of the federal question. In short, if the decision of the federal question was not necessary to the decision of the case, the judgment will not be reversed because the federal question was erroneously decided. Not only so, but if it is apparent that, in case of reversal on the federal question, the state court

will still have the right to decide the same way and render the same judgment on general grounds, regardless of the federal question, the judgment will not be reversed, although in its decision under review the state court did not decide the general question which was open to it on the record.

"Why should a judgment be reversed for an error in deciding the federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the federal question?"

Murdock v. Memphis, 20 Wall. 590.

This is the only part of the answer which sets up and claims the protection of the commerce clause of the constitution. Although the contracts made with the State Text-book Commission are fully pleaded, interstate commerce is not alluded to in that connection. So, if the third paragraph of the answer was not, *on general principles*, a defense to the action, the interstate-commerce question, though decided below, is not open for consideration here. And we think we have shown that, *on general principles*, it was not a defense.

Obligation of Contracts.

For several years school-district boards had possessed the power to adopt text-books and to make a species of contracts concerning them for a period of five years; but, in 1884, an act was passed making provision for county uniformity, and expressly repealing the provision which had given district boards this power.* Hence, no contract *with a school-district board* could have been in force after 1889. After the act creating the State Text-book Commission took effect, March 19, 1897, of course no school-book contract could be made otherwise than with that commission.

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*"The district board, each board of education, and each and every school district board, shall require a uniform series of text-books to be used in each separate branch of study in each school. But each board shall determine for itself, within six months from the passage of this act, the particular series of text-books which shall be used; and when such selection of text-books shall hereafter be adopted and introduced in pursuance of the provisions of this act by said boards, no change shall be made for a period of five years from the date of such introduction of any particular series of text-books, unless four-fifths of the legal voters of any such district shall petition for a change in the series of text-books adopted." (Session Laws 1879, ch. 157, § 1.)

"Section 1 of chapter 157 of the Laws of 1879 is hereby repealed." (Session Laws 1885, ch. 171, § 10.)

"School districts may, at their annual meetings for the election of school officers, indicate by a majority of all the votes cast at such meeting their desire for a county uniformity of text-books, which vote shall be transmitted to the county superintendent of public instruction by the clerk of the aforesaid school district, within ten days from the time of such vote.

"Whenever a majority of all the districts of a county in any one year shall indicate as in section 1 their desire for a county uniformity of text-books, the county superintendent of public instruction shall notify the districts of such vote, and at the same time call for one delegate from each municipal township and city of the third class in the county, to be elected at a meeting of the school boards of such township, on a day and at a place and hour specified in said call.

"The delegates so elected shall constitute a county text-book board, whose duty it shall be to select and prescribe the text-books to be used in each branch of study required by law to be taught in the public schools.

"No text-book shall be prescribed in pursuance of the provisions

The very last day, therefore, upon which a contract could have been made, even with a *county* text-book board, was March 18, 1897, and as it could have been for no longer period than five years, and could not have been renewed or extended, it must have expired March 18, 1902. As we have seen, contracts with the State Commission itself are for just five years, and as it let its first contracts in April, 1897, even its contracts must have expired in April, 1902. This action was brought June 7, 1902, when it was legally impossible that there could have been a single existing school-book contract of any character; yet the plaintiff in error pleaded in its answer:

"That this defendant, prior to the passage of the act of 1898, made and executed *certain con-*

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of this act unless the publishers thereof shall have first filed with the county superintendent of public instruction a guarantee of its price, quality and permanence of supply for five years, together with a good and sufficient bond for the faithful compliance with said guarantee, conditioned in such sum as the county text-book board may determine and approve.

"The county superintendent of public instruction shall be *ex officio* chairman of said county text-book board, and shall furnish each school district a list of the text-books selected and prescribed, in pursuance of the provisions of this act, which list shall be posted by the district clerks in their respective schoolhouses; and said list shall comprise the only legal text-books for the schools of said county, and it is hereby required of the school board to conform to the said lists in the text-books prescribed for use in their schools.

"When a uniformity of text-books shall be adopted in any county in pursuance of the provisions of this act, no change shall be made in such county for a period of five years from the date of such adoption of any particular series of text-books." (Session Laws 1885, ch. 171, §§ 1, 2, 4, 5, 6, 9.)

The act just quoted from absolutely repealed the provision conferring power upon district boards to select books, and thereafter, from 1885, contracts could be made only with county text-book boards, whether such boards had come into existence in some counties or not. In short, after 1885, contracts could not be made by district boards. Their authority had been expressly taken away.

tracts with school districts, fixing the price at which this defendant would sell certain publications to the public, which said contracts continued in force at the time of the passage of the said act, *and some of which are still in force*. That the only scope and purpose of said contracts was the fixing of the price at which publications might be sold and delivered by this defendant to such dealers or persons as might thereafter choose to buy. . . . And further answering, this defendant says, that if the said act of 1898, as amended, be construed as applicable to this defendant, and to authorize the court in this proceeding to grant the judgment of ouster therein prayed, then the said act is in violation of section 10, article 1, of the constitution of the United States, in so far as it attempts to interfere with the due performance by this defendant of its contracts made and entered into prior to the passage of said act, which are in force, it being a law impairing the obligation of contracts, and this defendant expressly invokes the protection of the constitution of the United States in that behalf."

(Printed record, pp. 17, 18, 111, 111½.)

This is all. With *what* school districts were contracts made? *When* were they made? What were their terms? Were they such contracts as school districts could lawfully make? Were they *contracts* at all? The court below was not, this court is not, permitted to answer these questions. From facts locked up in his own bosom, the pleader says there were *contracts*, and with his legal conclusion courts must rest content. *Facts* must be pleaded from which a court can see *for itself* that contracts existed before it can be

claimed with success that the obligation of contracts has been impaired. This is not to be assumed, nor is the mere word of the pleader to be taken for it. How many such contracts were there? When would they have expired?

But let us dismiss this. No such matter was in issue; no such question was decided. The opinion shows that no such question was decided. The pleadings show that no such question was in issue. But, aside from that, the case was disposed of at last with the distinct understanding of court and counsel that if any such school-board contracts *were* still in existence they were not to be affected by the judgment. A statute requires the supreme court of Kansas to make a complete record in all original cases, so that all that appears here is preserved as a permanent record by the supreme court of Kansas and modifies or qualifies its recorded judgment.

Counsel are not altogether ingenuous in their criticism of the supreme court of Kansas for not recollecting these alleged contracts in its judgment. They do not state all that occurred, but, singling out one remark of the chief justice, base all their comment upon that. Here is more of the colloquy:

CHIEF JUSTICE DOSTER: "You took contracts extending over a term of years which have not fully expired?"

MR. HISTED: "Yes, sir."

CHIEF JUSTICE DOSTER: "Are those pleaded here?"

MR. HISTED: "Yes, sir."

CHIEF JUSTICE DOSTER: "And you are asked to be ousted from your franchise to fulfil those contracts as well as other business?"

MR. HISTED: "Yes, sir."

JUSTICE SMITH: "Do you think this would have the effect you state if you were ousted?"

MR. HISTED: "The judgment asked by the plaintiff is absolute prohibition to this company from coming into the state of Kansas and doing any business in the state of Kansas."

MR. QUINTON: "We do not complain of any contract made by this company prior to the passage of the Bush law. We complain only that they failed to comply with the Bush act, and by reason of that failure they have no right to do business. Of course, if they had contracts in the state before that law was passed, there is nothing in this proceding that can touch those, and if the court would overrule that part of their defense, it would simply inject into this case something that is not contemplated."

This remark of Mr. Quinton's is explained by the naive attempt of counsel for the book company to have the court overrule this defense as of course.

CHIEF JUSTICE DOSTER: "You don't ask that the company be ousted from its franchise to fulfil the old contracts?"

MR. QUINTON: "No, sir; we do not. We simply complain of their right to do business under this act. That is another matter. The court cannot determine what contracts it affects now and what it don't affect."

MR. HISTED: "Have we a right in trying this case to adopt the same rules of procedure and evidence that would obtain in a district court, and to interpret the position of the party by his pleadings and the orders obtained, and has he a right to come in and interpret them on the trial?"

CHIEF JUSTICE DOSTER: "Where a party disavows an intention to ask certain relief, the court will act upon his disavowal. They disavow any intention to oust you from the fulfilment of those old contracts. We will bear that in mind when we come to render judgment, in case it should be adverse to you in any particular."

(Printed record, p. 40.)

On cross-examination of a witness for plaintiff in error:

"Have n't you made contracts?"

"With whom?"

"It does n't make any difference whom—in the state of Kansas since 1898?"

MR. HISTED: "*That is not in issue.*"

CHIEF JUSTICE DOSTER: "Suppose it has made contracts—what then?"

MR. QUINTON: "That 's all; I just wanted to show they were doing business."

THE WITNESS: "I thought I stated fully——"

CHIEF JUSTICE DOSTER: "Never mind; the question is withdrawn."

(Printed record, p. 48.)

If the court failed to properly guard the matter in its judgment, the remedy of the plaintiff in error was a motion to that court to do so, not a writ of error alleging that the court had *decided* a federal question against it. We need not argue this proposition. The case is clearly not one con-

templated by the act of Congress as to writs of error to state courts.

In passing upon an appeal to the contract clause of the constitution, made in a case which involved the corporation law of Wisconsin with reference to foreign corporations, this court recently said: "We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made."

Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 615.

That case is very much in point here, and with its citation we leave this question.

Occlusion of Courts.

The brief for the plaintiff in error attempts to raise still another question, neither embraced in the assignment of errors nor raised below—the occlusion of the Kansas courts, under a provision of the Bush act, against foreign corporations under certain circumstances.

(Brief for plaintiff in error, pp. 17, 33.)

A corporation is not a citizen within the meaning of the fourth article of the federal constitution as to "privileges and immunities," including the right to resort to the courts of a state, nor is it, as to a state other than that of its creation, "within its jurisdiction," so as to be able to claim the protection of the provision of the fourteenth

amendment as to "the equal protection of the laws."

Blake v. McClung, 172 U. S. 239.

The question was not involved in this case. No question of the kind had yet arisen. And if it should arise, and that portion of the act should be held void, the remainder of the act would not be affected. Whether, that portion being void, the remainder of the act would be affected, would not be a federal question. But nothing of the kind was involved or decided; and "sufficient unto the day is the evil thereof."

THE REAL QUESTION.

From the record brought here, it is apparent that the real object of attack and defense in this case, as distinctly understood by both court and counsel, was the right of the American Book Company, without fully complying with the Bush corporation act, to enter into contractual relations with the State Text-book Commission.

As to the right *to sell* school-books in the state for use in the public schools, no question could arise under the corporation act; for that right depends upon whether a contract has been made with the Text-book Commission. If a valid contract has been made with the commission, the corporation is not only not forbidden to sell books in the state, but is required to do so under penalty of having its bond enforced. If no such valid contract has been made, the corporation cannot sell books in the state, *although it has fully complied with the corporation law*, for it made a misdemeanor for any one to purchase books from it. If, notwithstanding the corporation has not complied with the Bush law, the commission can make a valid contract with it, then it may and must sell books in the state, and it need *never* comply with the Bush law. The only question is the legal power to contract with the commission.

It is the text-book law—not the corporation

act—which interferes with the sale of books for use in the public schools of Kansas. No matter how piously it may have complied with the Bush act, a foreign corporation may sell no school-books, for no one may sell them, without a contract with the Text-book Commission. As to the only transactions involved in this case or intended to be affected by the proceedings or the judgment, or capable of being so affected, the Bush law is involved only in the single question—May the commission lawfully contract with a corporation which has not complied with the law concerning corporations? And that is a mere question of statutory interpretation—not a federal question. The only corporate power attacked by the proceedings, the only corporate power from the exercise of which the book company was to be ousted, the only corporate power which, from the very nature of its business, could have been involved, was the corporate power of entering into contracts with the Text-book Commission. In brief, the only law which in any manner interferes with interstate commerce in the only goods in which the plaintiff in error deals is the act creating the State Text-book Commission, which was not attacked below, is not here attacked, *upon any ground whatever!*

Could that law *be* successfully attacked as an interference with commerce?

As *parens patriæ*, may not a sovereign state

select the text-books its children shall use, fix their price, and arrange for their supply?

"Except so far as its connection with the constitution and laws of the United States alters its position," the state of Kansas "is a sovereign state, possessing all the powers of the most absolute government in the world."

Doyle v. Continental Insurance Co., 94 U. S. 535.

As a sovereign state, it certainly has the right to say with whom it will or will not contract, and with whom its agencies shall or shall not contract; and, like any other sovereign, is not bound to render *any* reason, much less a good one, for its preference. Though this court may hold a statute void, the state may still require its obedience by its own officers and agencies when acting for it or in its name or behalf, and its sovereign act will be beyond the reach of this court. All this was set at rest by the decision already cited — Doyle v. Continental Insurance Co. This statute, whether valid or void as to others, was a *direction of a sovereign state to its own agents not to do business in its behalf with certain corporations.* Had not the state a right to select the persons with whom it would deal? Is it a violation of the interstate-commerce clause of the constitution for a sovereign state to refuse to purchase goods, even if interstate-commerce goods, of a particular corporation? Then it is

also a violation of the commerce clause for a private citizen to refuse to buy of a certain person if he be engaged in interstate commerce!

But, again, the right to assert protection under a provision of the federal constitution may be waived. "A person may, by his acts or omission to act, waive a right which he might otherwise have under the constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a federal one."

Pierce v. Somerset Railway, 171 U. S. 641–648.

When one approaches the Kansas State Textbook Commission with a bid, does he not throw to the winds the protection of the commerce clause of the constitution? The prices at which goods are to be sold are to be fixed, as also the commissions of agents or dealers; the publisher is required to keep a stock on hand at every county-seat; the commerce must be maintained for five years, whether profitable or otherwise. Could either of these regulations survive a single moment if exposed unprotected to the fierce heat of the commerce clause of the constitution? The successful bidder becomes *pro hæc vice* as much an officer or agent of the state as is the state printer, and he, no more than the state printer, can claim the protection of the constitution as if engaged in interstate commerce. His shipments

are not interstate-commerce shipments. They are not made in the ordinary course of open traffic. They are made in obedience to the laws of Kansas, to which, right or wrong, he has expressly agreed uncomplainingly to submit. When a case of such a character as this comes here, it is time to repeat what was said in a recent case:

"Unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce. Practical lines have to be drawn and distinctions of degree must be made."

Diamond Glue Co. v. United States Glue Co., 187 U. S. 611–616.

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Supreme Court of the United States.

No. 126.—October Term, 1903.

The American Book Company, Plaintiff in Error, vs. The State of Kansas ex rel. Galen Nichols, County Attorney of Shawnee County.	In error to the Supreme Court of the State of Kansas.

[February 23, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

This is a proceeding in *quo warranto*, brought in the Supreme Court of the State of Kansas by the county attorney of Shawnee County of said State to oust defendant in error from doing business in the State, and to declare void certain contracts entered into by the defendant in error with the State Text Book Commission.

A preliminary injunction was granted restraining plaintiff in error from entering into any contract with any person in the State and from furnishing school books to its agents in the State.

Passing finally on the relief prayed for the Supreme Court, awarding judgment, said:

"The plaintiff cannot, in this action, have an annulment of the contract already made. It may be that there are equitable circumstances forbidding the cancellation of such contract. It may be that compliance with the law by the defendant hereafter will retroactively validate the contract in the event it should now be invalid. However, independently of such consideration, we do not have jurisdiction over that branch of the case. Our jurisdiction is in *quo warranto* alone. A grant of that jurisdiction does not authorize the joinder to a cause of action for ouster of another one for the annulment of a contract, merely because the subject matter of the latter possessed incidental connection with the subject matter of the former.

"The defendant will be ousted of its claimed rights to do business in this State until it complies with the requirements of law, but the prayer of the petition for the annulment of the contract will be denied."

Plaintiff in error is a New Jersey corporation engaged in the publishing and selling of school books, and the charge of the defendant in error is that plaintiff in error was doing business in the State without having complied with the laws of the State in regard to foreign corporations.

The laws of the State require a foreign corporation, as a condition of the right to do business in the State, to make an application to the Charter Board of the State to do such business and to file a certified copy of its

charter or articles of incorporation, and to furnish certain information to such board. The statute also required the payment of a charter fee graduated upon the amount of the capital stock of the corporation. (Ch. 10, Laws 1896; Gen. Stat. 1901.)

The court held that plaintiff in error had "complied, although irregularly, informally and out of time, with the law, except as to section two of chapter ten of the laws of 1898," and the requirements of that section were necessary to give plaintiff in error "the status of a foreign corporation authorized to do business" in the State.

The defense of plaintiff in error was, and its contention is here, that its business was solely that of interstate commerce, and that the statute of Kansas alleged to have been violated could have no application to such business, and the court had no power to exclude plaintiff in error from transacting interstate commerce in the State. It was and is further contended that plaintiff in error had entered into contracts with certain persons and corporations in the State for the sale and delivery of its publications, which contracts were still in force and effect, and under which plaintiff in error had incurred liability; and if the statutes be construed as applicable to it they would impair the obligations of those contracts and be in violation of section ten of article one of the Constitution of the United States.

A motion is made to dismiss on the ground that the judgment of the Supreme Court has been complied with. The compliance is not denied, but it is attempted to be justified on the ground that plaintiff in error had only to the 15th of September "to supply the wants of the public schools in Kansas with the books it had contracted to deliver, and under the stress of this public necessity, and under the sanction and penalties of its contract, it felt coerced to make a payment aforesaid (the charter fee) and otherwise to comply with the statute as interpreted by the Supreme Court in the case at bar."

It also urged that another suit has been brought by the same law officer of the State in the name of the State, in the District Court of Shawnee County, which suit is pending in the Supreme Court on appeal from the ruling of the District Court denying a temporary injunction, and that it is contended by the State the judgment of the Supreme Court in the case at bar was an adjudication of a non-compliance of plaintiff in error with the statutes of the State. And, it is alleged, that the same defenses were made as in the case at bar. It is hence contended that "there still exists a controversy, undetermined and unsettled," involving the right of the State to enforce the statute against a corporation engaged in interstate commerce.

The motion to dismiss must be granted. We said in *Mills* v. *Green*, (109 U. S. 651):

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that, when pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

The principle was discussed at some length and many illustrations of its enforcement were given. It has had illustration since. (*Flour Inspector* v. *Glover*, 160 U. S. 170; *Codlin* v. *Kohlhauser*, 181 U. S. 151.)

The case at bar is certainly within the principle. The judgment has been complied with. It makes no difference that plaintiff in error "felt coerced" into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. After compliance there is nothing to litigate.

It is further urged that another suit has been brought and, as decisive of its issues or some of its issues, the judgment in the case at bar is pleaded. But that suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over and is limited by the conditions of the case now before us.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.